90-127

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LODGE NO. 1777,

Petitioner,

against

FANSTEEL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

1. Whether the important Federal policy in favor of arbitration of labor disputes requires the district court, in an action to enforce or vacate an arbitration award, to apply a deferential, rather than a *de novo*, standard of review, of an arbitrator's determination of arbitrability when the issue of arbitrability was voluntarily submitted to the arbitrator for decision in the first instance.

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FANSTEEL, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

International Association of Machinists and Aerospace Workers, Lodge No. 1777, (Lodge 1777), petitions for the issuance of a writ of certiorari to review an order of the United States Court of Appeals for the Seventh Circuit affirming the district court's grant of summary judgment in Fansteel, Inc.'s (Fansteel) action to vacate an arbitration award rendered in favor of Lodge 1777.

OPINIONS BELOW

The order of the court of appeals (App. A.) is reported at 900 F.2d 1005 (7th Cir. 1990). The opinion and order of the district court (App. B.) is reported at 708 F. Supp. 891 (ND IL1989). The arbitration award (App. C.) which is the subject of the two court awards is unreported.

JURISDICTION

The order of the court of appeals was entered April 16, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the Labor Management Relations Act of 1947, 29 U.S.C. §141 et seq., are pertinent to this case:

Section 201(b):

> the settlement of issues between employer and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; . . . .

29 U.S.C. §171(b).

Section 203(d):

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

29 U.S.C. §173(d).

Section 301:

Suits By And Against Labor Organizations.

(a) Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

• • •

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

29 U.S.C. §185(a) and (c).

STATEMENT

This case presents the question of the appropriate standard of review of an arbitrator's determination of the issue of arbitrability where that issue was voluntarily submitted, in the first instance, to the arbitrator for his decision. Specifically, it concerns whether the court, in reviewing an arbitrator's award can properly apply a *de novo* standard of review of the arbitrator's resolution of an arbitrability dispute. The resolution reached by the United States Court of Appeals for the Seventh Circuit misapplies the decisions of this Court, and conflicts with the decisions of the United States Court of Appeals for the First, Third, Sixth, Eighth, Ninth and Eleventh Circuits.

Fansteel and Lodge 1777 have been parties to a series of collective bargaining agreements covering approximately 80 employees employed by Fansteel at its facility in North Chicago, Illinois. The prior collective bargaining agreement expired on May 31, 1987, and, when the parties were unable to reach agreement, the employees represented by Lodge 1777 went on strike.

During the strike, Fansteel began hiring replacements for the striking employees. Fansteel hired a total of 39 replacements, 31 of which were given entry level Grade 8 classifications. The remaining seven replacements were hired in classifications requiring more experience and skill, or in classifications that were outside the contractual grade system.

On the morning of July 11, after negotiating throughout the night, Lodge 1777 and Fansteel finally executed a strike settlement agreement and a new collective bargaining agreement. The strike settlement agreement provided that disputes would be decided pursuant to the provisions of the collective bargaining agreement:

> Any dispute arising in the implementation of this Agreement may be referred to the Grievance Procedure of the new Collective Bargaining Agreement or to other appropriate Governmental Agency.

(App. B at 5, 14). The grievance procedure of the collective bargaining agreement provides:

> Should any employee feel aggrieved by any matter arising out of his employment by the Company, or should any difference arise between the Company and the Union
>
> (a) as to the meaning and application of any of the provisions of this Agreement, or
>
> (b) respecting any other matter relating to rates of pay, wages, hours or other conditions of

> employment affecting the employees of the Company
>
> an earnest effort shall be made by all of the parties to settle such grievances or differences promptly by means of the following procedure, and there shall, under no circumstances, be any suspension of work on account of such grievances or differences.

(App. B at 13-14).

Shortly after the strikers were returned to work, Lodge 1777 filed a grievance concerning Fansteel's working the replacement employees outside of their classification.[1] Fansteel responded by unilaterally and retroactively upgrading the replacements to classifications other than entry level positions. The grievance was processed through the grievance procedure and to arbitration.

On April 15, the arbitration hearing was conducted before Arbitrator Aaron Wolff, who was selected by the parties pursuant to the collective bargaining agreement. At the outset of the hearing, Fansteel took the position that the dispute was not arbitrable:

> Therefore, any award of the relief that the union appears to be seeking in this case would be beyond

---

[1] One of the major stumbling blocks towards the resolution of the strike was Fansteel's determination to keep the replacement employees and Lodge 1777's request that they be displaced by strikers. When the parties could not resolve this issue, they agreed to disagree, and the strike settlement agreement contained a marginal note that explained Fansteel's position and Lodge 1777's refusal to agree. The provision in question also contained the following language:

> The rights as stated in items 2 and 3, if any, of the persons put to work after the start of the strike will be determined by mutual agreement of the parties, or the NLRB or an agency or a court of competent jurisdiction subject to all rights of appeal and all applicable rules and regulations of the NLRB or such agencies or courts.

(App. A at 3).

> the scope of the collective bargaining agreement and would not be legal and to that extent we believe that what the union is seeking is not authorized by the collective bargaining agreement.
>
> We are willing to let the arbitrator make that determination in the first instance. However, we want to make clear that we are in no way . . . suggesting that the arbitrator has contractual authority to order the strikers to be reinstated or to provide back pay in lieu of reinstatement for that matter.

(App. A at 6). Moreover, Fansteel made abundantly clear that it was submitting the arbitrability issue to the arbitrator for decision:

> MR. HEMMENDINGER: Before you start this witness, there is one more thing. There was a discussion off the record about the fact that the company is contending that the relief sought by the union is non-arbitrable and that the grievance is to the extent it seeks reinstatement of strikers for back pay in lieu of reinstatement also non-arbitrable and I believe the union's suggestion was that if that is the position taken by the company, then we should refuse to submit this case to arbitration. He cited a couple cases which I have not looked at.
>
> I want to make it clear on the record that we are not waiving any objection in that regard but think it is an issue to be decided in the first instance by the arbitrator subject to review by a court if the arbitrator exceeds his jurisdiction under the collective bargaining agreement and the submission and certainly if the union feels that we are waiving anything by going forward here, then I would want to take a close look at the cases discussed in order to avoid any such waiver.

(App. D at 3-4). Thus, there can be no doubt that Fansteel voluntarily agreed to submit the arbitrability issue to the arbitrator for decision in the first instance. Fansteel then proceeded to hearing, presenting both the arbitrability issue and the merits to the Arbitrator.

On September 29, the Arbitrator issued his decision and award. (App. C). The Arbitrator first noted that in order to decide the arbitrability dispute, he was required to set forth the issues on the merits. He set those issues out as follows:

> 1) Did the Company violate the CBA in the manner in which it used the new hires after the strike was over and before it reclassified them?
>
> 2) Did the Company violate the CBA or the SSA in the manner in which it reclassified and upgraded the new hires on or about July 28?
>
> 3) Did the Company, after the strike was over and the CBA was in effect, use foremen to perform bargaining unit work in violation of the CBA?
>
> 4) If the Company did violate provisions of the CBA or the SSA, what remedies are appropriate under the circumstances?

(App. C at 32).

After setting forth the issues, he examined the arbitration provision of the collective bargaining agreement, which he characterized as very broad. He then examined the arbitration provision of the strike settlement agreement, which he also characterized as being broad. The Arbitrator found that "[w]hether or not the Union is correct in its interpretation of the various provisions of the collective bargaining agreement and strike settlement agreement on which it relies, the disputes or issues raised here plainly fall within the scope of 'differences' or disputes under Article 13 of the collective bargaining agreement and Item 15 of the strike settlement agreement and are, therefore, arbitrable." (App. C at 33). In

so finding, the Arbitrator was careful to limit the effect of his award. He expressly stated that the "rights of the replacements were not before the arbitrator . . . and that nothing in [his] award should be construed as passing upon the rights of the replacements." (*id.*)

After finding that the dispute was arbitrable, the Arbitrator found that Fansteel had violated the collective bargaining agreement and the strike settlement agreement by working the new hires outside of their classifications, by unilaterally upgrading the new hires, and by allowing supervisors to perform bargaining unit work.[2] (App. C at 31-32, 33-49). The Arbitrator then ordered Fansteel to post for bid all of the positions into which the new hires were upgraded, and to make all affected employees whole for any losses they may have suffered. (App. C at 50-51).

Fansteel refused to comply with the Arbitrator's award, and filed an action to vacate that award. Lodge 1777 filed a separate action seeking to enforce the award. The cases were consolidated, and the parties each moved for summary judgment. The district court vacated the arbitration award, finding, in agreement with Fansteel, that the dispute was not arbitrable. In so doing, however, the district court failed to address Lodge 1777's claim that a deferential standard of review was appropriate. Instead, the court found that Fansteel had not waived its right to challenge arbitrability by proceeding on the merits before the Arbitrator,[3] and, that this finding "obviates the need to address another question: What would be the appropriate standard of review of the arbitrator's decision on arbitrability? On that issue, see the general

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[2] Fansteel never challenged the arbitrator's authority to hear and render an award on supervisors performing bargaining unit work.

[3] Although, in the appendix to its decision, the district court stated that if it were writing on a clean slate, it would find Lodge 1777's argument persuasive, and hold that a party who submits a dispute to an arbitrator without first challenging arbitrability waives its right to subsequently challenge arbitrability in court.

discussion in *Jones Dairy*, 760 F.2d at 176." (App. B at 12 n.9). The district court reviewed the arbitrability issue *de novo*.

Lodge 1777 appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit, in its decision, quoted the remarks by Hemmendinger regarding Fansteel's voluntary submission of the arbitrability issue to the Arbitrator, and noted that the Arbitrator did find the dispute arbitrable. However, despite Fansteel's voluntary submission, the Seventh Circuit held that it was entitled to review the arbitrability issue *de novo*:

> Thus, where one party has clearly preserved the question of arbitrability for judicial determination, and there is no agreement that the arbitrator resolve the issue of arbitrability, we are called upon to make an independent determination of the arbitrability question. While we note that the arbitrator attempted to decide the arbitrability question, the resolution of this question is our responsibility and we will approach this issue *de novo* without deference to the arbitrator's decision.

(App. A at 9-10). After a *de novo* review of the arbitrability issue, the Seventh Circuit affirmed the district court's finding that the dispute was not arbitrable.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals is inconsistent with the strong national policies in favor of arbitration, as well as this Court's long standing decisions concerning the deference to which arbitration awards are entitled. Moreover, it is contrary to the decisions reached by the courts of appeals for the First, Third, Sixth, Eight, Ninth and Eleventh Circuits. The prompt resolution of this issue is a matter of great national importance, as it can finally put to rest the myriad of challenges to arbitration awards and set forth the procedures to be

followed by unions and employers alike in administering the grievance and arbitration provisions of their collective bargaining agreements.

I.

THE SEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT AND DIRECTLY CONFLICTS WITH THOSE OF OTHER COURTS OF APPEALS

The Seventh Circuit has misapplied this Court's holding in *AT&T Technologies, Inc. v. Communications Workers of America, et al.*, 475 U.S. 643, 649 (1986). In *AT&T Technologies*, the Court reviewed the litany of cases dealing with arbitrability issues, and restated the general rule that "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." This pronouncement actually stems from the Steelworker's Trilogy,[4] where this Court held that "Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960). Here, the Seventh Circuit completely ignored Fansteel's express submission of the arbitrability dispute to the arbitrator. Fansteel's voluntary submission distinguishes this case from those like *AT&T Technologies* and *Warrior & Gulf* where the arbitrability issue was not presented to the arbitrator for determination.

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[4] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960), *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

In cases where the arbitrator is vested with the authority to rule upon the arbitrability issue, it becomes like any other issue submitted to the arbitrator. A party can obtain review of that issue, but only a circumscribed review. In *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), this Court first addressed the standard of review of arbitration awards. There, this Court held:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The Federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . . [T]he question of the interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Enterprise Wheel, 363 U.S. at 596, 599.

This deferential standard of reviewing arbitration awards has been continually emphasized by the Court. Thus, in *W.R. Grace & Co. v. Local 759, International Union*, 461 U.S. 757 (1983), after finding that the arbitrator's interpretation "drew its essence from the collective bargaining agreement," the Court held that "regardless of what our view might be on the correctness of [the arbitrator's] interpretation, the Company and Union bargained for that interpretation. A federal court may not second guess it." *W.R. Grace*, 461 U.S. at 765.

As if these pronouncements were not clear enough, in *United Paperworkers International Union v. Misco*, 484 U.S. 29 (1987), the Court was again asked to address a matter

involving the review of an arbitrator's award. In that case, the Court again found:

> [T]he arbitrator's award settling a dispute with respect to the interpretation and application of a collective bargaining agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing and applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. Of course decisions procured by the parties through fraud or through the arbitrator's dishonesty need not be enforced. But there is nothing of that sort involved in this case.

Misco, 484 U.S. at 38. Thus, in construing arbitration awards, this Court has repeatedly stressed that federal courts are not to examine the merits of the dispute submitted to the arbitrator for decision, but rather, the arbitrator's decision must be enforced unless he acted outside his authority.

The other circuit courts have generally recognized this principle, and therefore use a deferential scope of review of an arbitrator's determination of any dispute that had been submitted to him for decision. In fact, the circuit courts have recognized that many issues can be submitted to arbitration even though they are not covered by the express language of the collective bargaining agreement. Thus, in *Jones Dairy Farm v. Local No. P-1236*, 760 F.2d 173, 175-176 (7th Cir. 1985), the Seventh Circuit held that parties could agree to submit any dispute to arbitration, even disputes over purely legal matters. In so doing, however, the parties are each bound by the arbitrator's determination. To hold otherwise, would give a party multiple bites at the same apple:

> If people want a question of law resolved by an arbitrator rather than a judge, there is nothing to stop

> them. It would be odd if having consented to have the arbitrator decide what its legal rights . . . were, Jones Dairy Farm could then have the same question redetermined by two courts — the district court and this court. We hold it could not, and therefore that the judgment must be reversed with instructions to enforce the arbitration award.

Jones Dairy, 760 F.2d at 176.[5] See also, *Capitol City Telephone Co. v. Communication Workers of America*, 575 F.2d 655, 658 (8th Cir. 1978) ("Assuming that the original collective bargaining agreement did not provide for arbitration of the damage issue, we are persuaded that the parties nevertheless independently agreed to submit this issue to arbitration."). When issues that are otherwise not arbitrable are submitted to an arbitrator for decision, they may be reviewed by the courts only under the deferential standard.

This principle has been consistently applied by the other circuit courts to arbitral decisions regarding the arbitrability of an issue. Thus, where a party either expressly or through conduct voluntarily submits the arbitrability question to the arbitrator, the arbitrator's decision on that issue is subject to the same standard of review as his decision on the merits of the dispute. *Local 369 Utility Workers Union v. Boston Edison Co.*, 752 F.2d 1, 3 (1st Cir. 1984) ("Decisions on questions expressly committed to the arbitrator for determination [including arbitrability] are reviewable only to the extent necessary to determine if the arbitral award 'draws its essence from the collective bargaining agreement.'"); *Pennsylvania Power Co. v. Local Union No. 272*, 886 F.2d 46, 48 (3rd Cir. 1989) ("As with arbitrators' decisions on the merits, a decision on arbitrability will be affirmed as long as it 'draws its essence' from the collective bargaining agreement."); *Vic*

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[5] This is the language cited by the district court as the appropriate standard of review, however, the district court and the Seventh Circuit reviewed the arbitrator's determination in this case *de novo*. (App. B at 12 n.9).

Wertz Distributing Co. v. Teamsters Local 1038, 898 F.2d 1136, 1139-1140 (6th Cir. 1990) ("Therefore, the arbitrator's decision on arbitrability will be affirmed 'unless it fails to draw its essence from the collective bargaining agreement'"); *Franklin Electric Co. v. International Union U.A.W.*, 886 F.2d 188, 192 (8th Cir. 1989) ("Once [the arbitrability] issue is properly before the arbitrator, the standard of judicial review for the decision is deferential: if the award 'draws its essence from the collective bargaining agreement,' then it must be enforced."); *George Day Construction Co. v. United Brotherhood of Carpenters*, 722 F.2d 1471, 1476 (9th Cir. 1984) ("Where the question of arbitrability is decided by the arbitrator, we are not at liberty to substitute our own view in place of the arbitrator's regardless what our view might be of the correctness of the arbitral decision"); *Hardin's Bakery v. Retail, Wholesale and Department Store Union*, 877 F.2d 1541, 1545 (11th Cir. 1989) ("Although arbitrability of a dispute ordinarily is a matter for judicial determination, . . . even that issue is beyond the courts' scrutiny if the parties clearly and unmistakably have vested in the arbitrator the authority to decide the question of arbitrability.").

Despite the clear pronouncements from this Court, and the unerring application of this Court's pronouncements by all of the other circuit courts that have addressed the issue, and its own application of this principle to other legal issues, the Seventh Circuit has held that it can review de novo an arbitrator's determination of the arbitrability issue. The decision of the Seventh Circuit is clearly wrong, and cannot be allowed to stand.

II.

PROMPT RESOLUTION OF THIS CONFLICT IS A MATTER OF GREAT NATIONAL IMPORTANCE

Not only is there a conflict between the Seventh Circuit and the other courts that have specifically addressed this

issue, but the resolution of this matter is of extreme national importance. The deference given to arbitrators' determinations on matters that were submitted for decision stems from the important Federal policy in favor of quick resolution of labor disputes. Under the congressional scheme, labor arbitration is the preferred method of resolving disputes between employers and labor organizations:

> (d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

29 U.S.C. §173(d). Parties to collective bargaining agreements should be encouraged to voluntarily submit their disputes to arbitration. It is less costly than court litigation, frees the courts' dockets and brings an expert in the law of the shop to decide the issues between the parties. Final and binding arbitration loses its meaning when courts are free to review an arbitrator's determination *de novo*, and substitute their decisions for that of the arbitrator.

The district court noted the unfairness of allowing an employer to take his first bite on the arbitrability apple before the arbitrator, and then get another before the district court. However, the district court mistakenly believed that this Court's decision in *AT&T Technologies* and the Seventh Circuit's decisions in a number of cases predating *AT&T Technologies* required it to decide the arbitrability issue regardless of whether that issue had been presented to the arbitrator for determination. The Seventh Circuit affirmed the district court's mistaken view, and that view will prevail in this circuit unless and until this Court orders otherwise. Thus, in the Seventh Circuit, as opposed to all other circuits that have addressed the issue, employers can make their arbitrability

arguments to the arbitrator, and, if unsuccessful, they can raise precisely the same arguments before the courts. This guarantee of *de novo* review is a slap in the face of the national policy in favor of arbitration.

Most importantly, this Court can put an end to this confusion without burdening its docket. Because the Seventh Circuit's decision is so out of line with the pronouncements of this Court as well as those of all of the other circuits who have examined this issue, this Court can summarily vacate the Seventh Circuit's decision and remand it for a determination of whether the arbitrator's arbitrability findings draw their essence from the collective bargaining agreement.

CONCLUSION

For the reasons stated, this Court should grant the petition for certiorari, summarily vacate the Seventh Circuit's decision, and remand the case to the Seventh Circuit with instructions to review the arbitrator's arbitrability decision to determine if it draws its essence from the collective bargaining agreement. Alternatively, the petition should be granted, and the case given full review.

Respectfully submitted,

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July 1990

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 89-1682

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE NO. 1777,

Plaintiff-Appellant,

v.

FANSTEEL, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 88 C 9091, 88 C 9147 — Milton I. Shadur, *Judge.*

ARGUED OCTOBER 26, 1989 — DECIDED APRIL 16, 1990

Before CUMMINS, COFFEY, and MANION, *Circuit Judges.*

COFFEY, *Circuit Judge.* International Association of Machinists and Aerospace Workers, Lodge No. 1777 (hereinafter Union) appeals from a summary judgment entered in favor of Fansteel, Inc., vacating sections of an arbitration award on the ground of non-arbitrability. We affirm.

I.

Fansteel and the Union were parties to a collective bargaining agreement expiring May 31, 1987, that covered approximately 80 Fansteel employees at Fansteel's North Chicago plant. The Union and Fansteel were unable to reach

an agreement during negotiations for a new contract that took place prior to the former contract's expiration date. As a result of the parties' failure to negotiate a new agreement, the Union went out on strike on June 1, 1987. In response to the Union's strike Fansteel hired 39 permanent replacements, 31 of whom were assigned to Fansteel's entry level classifications.

During the final stages of the strike Fansteel and the Union negotiated over the conditions under which the strikers might return to work. The parties agreed to the following language as part of a strike settlement agreement:

> "The strike against Fansteel, Inc. by the Company's employees who are members of one of the Unions is terminated as of the date of this Agreement. Striking employees shall be returned to work to openings in the classifications occupied by the employee on May 31, 1987, in accordance with their respective seniority, and the recall provisions of the Collective Bargaining Agreement(s) shall determine the order of return to work."

In addition to the above agreed upon language, Fansteel proposed that the Strike Settlement Agreement contain the following two sections (paragraphs 2 and 3), to which the Union objected:

> "2. Jobs filled by employees hired by the Company on or after June 1, 1987 as replacements for striking employees (new hires) shall not be considered vacancies to which returning strikers shall be returned unless and ~~until~~ such jobs are vacated by the strike replacements. Such new hires shall not be bumped or displaced by the return of strikers. Such newly hired employees shall become members of the Union(s) as stated in the Collective Bargaining Agreement and their respective seniority shall be measured from their individual hire date.

> 3. A newly-hired employee shall not be 'displaced' or 'bumped' as a result of an employee returning to work after an illness or injury leave of absense (industrial or non-occupational). The returning employee may exercise his/her seniority affecting other employees other than those newly hired and otherwise in conformance with the Collective Bargaining Agreement(s)."

Because the parties did not agree to Fansteel's proposal concerning these two paragraphs, the parties determined that while paragraphs 2 and 3 would physically remain in the printed Agreement, the following marginal notation would be added reflecting the parties' failure to agree to these provisions. This marginal note read:

> "Items 2 and 3 represent the position of the Company and are not agreed to by the Union or waived by the Company."

The parties also agreed to add a new unnumbered paragraph that read:

> "The rights as stated in Items 2 and 3, if any, of the persons put to work after the start of the strike will be determined by mutual agreement of the parties, or the NLRB or an agency or a court of competent jurisdiction subject to all rights of appeal and all applicable rules and regulations of the NLRB or such agencies or courts."

The parties also agreed to other provisions in the strike settlement agreement that were relevant to disputes concerning this agreement:

> "14. The Company and the Unions agree that neither of them shall take any action against an employee because he participated in or failed to participate in the strike. Any action by the Union or any

> employee taken before the NLRB or court concerning the persons put to work after the start of the strike is not prohibited by this item 14.
>
> 15. Any dispute arising in the implementation of this Agreement may be referred to the Grievance Procedure of the new Collective Bargaining Agreement or to other appropriate Governmental Agencies."

On July 11, 1987, the parties entered into a strike settlement agreement that contained the terms previously enumerated and also agreed upon a new collective bargaining agreement. On July 15, 1987, thirty of the strikers returned to work.[1] On that same day the Union filed a grievance under the parties' collective bargaining agreement that stated:

> "The Company is using new hires (probationary) and salaried personnel to keep it's (sic) Union and senior employees from returning to work.
>
> This is a violation of the current Collective Bargaining Agreement, and in particular, articals (sic) 16-6-10-&22 as well as the letters on pages 111-112-113-118-&119.
>
> We demand that any employees affected by this violation be compensated for losses suffered."

On July 21, 1987, the Union and Fansteel met concerning the above grievance. On July 28, 1987, Fansteel responded to the Union's position that the company was violating the Collective Bargaining Agreement in using

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[1] On July 13, 1987, between the settlement of the strike and the return of many of the strikers to work, the Union filed an unfair labor practice charge with the National Labor Relations Board. This charge was dismissed on August 28, 1987 and the Union's appeal of this dismissal to the Board's General Counsel was rejected on April 14, 1988.

replacements ("new hires") with the following announcement:[2]

> "The Company will classify the 'new hires' in the job classification appropriate for the work 'new hires' were hired to do and have been performing. This classification will be effective as of the hire date of each of the 'new hires,' respectively."

Fansteel then upgraded all the replacements in Labor Grade 8 to the next higher grade in each department (either Labor Grade 6 or 5), without following the contractual procedures of job posting and bidding.

The Union requested arbitration on August 4, 1987, and on April 15, 1988, an arbitration hearing was held. At the outset of the arbitration hearing, Fansteel noted its objection to the arbitrability of the grievance. While declaring that Fansteel was willing to proceed with the arbitration, subject to its arbitrability objection, Fansteel's attorney stated:

> "To the extent this grievance arises concerning the implementation of the strike settlement agreement, it is clearly arbitrable. However, to the extent that the union is seeking in its grievance the reinstatement of the strikers who were replaced by permanent replacements during the strike, such relief is clearly not authorized by the collective bargaining agreement or strike settlement agreement which expressly recites the parties failure to reach agreement on reinstatement and which expressly provides for a forum to decide that issue, which would be the National Labor Relations Board and not arbitration.

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[2] The Union argued that Fansteel was violating the contract in utilizing replacements classified as Labor Grade 8 to do work that Labor Grade 8 employees could not perform under the terms of the collective bargaining agreement.

> Therefore, any award of the relief that the union appears to be seeking in this case would be beyond the scope of the collective bargaining agreement and would not be legal and to that extent we believe that what the union is seeking is not authorized by the collective bargaining agreement.
>
> We are willing to let the arbitrator make that determination in the first instance. However, we want to make it clear that we are in no way submitting to the arbitrator the question of the lawfulness of the union's [sic] hiring permanent replacements, which is an issue for the National Labor Relations Board."

Fansteel and the Union then proceeded with the arbitration hearing. The arbitrator's award initially determined that Fansteel's decision to proceed with the arbitration hearing did not waive its arbitrability objection. However, the arbitrator also determined that the issues the Union had submitted to arbitration (violation of the collective bargaining agreement in permitting the new hires to work after the strike in positions reserved for higher classifications, violation of the collective bargaining agreement or the strike settlement agreement in the retroactive re-classification of the replacement employees, and the appropriate remedy) were all arbitrable.[3] The arbitrator went on to hold that Fansteel violated the collective bargaining agreement because the new hires were performing work outside of their job classification and Fansteel's retroactive reclassification of the replacements violated the collective bargaining agreement. As the remedy for Fansteel's violations, the arbitrator ordered Fansteel to post for bidding all job positions into which Fansteel had

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[3] The arbitrator also determined that the question of whether the collective bargaining agreement prohibits supervisors from working in employee positions was arbitrable. This determination is not part of this case because Fansteel has not sought to have this aspect of the decision vacated.

upgraded the replacements and to make whole for lost earnings any employees entitled to these positions.

II.

Initially the Union argues that Fansteel waived its arbitrability objection and consented to the arbitration of the Union's grievance when Fansteel agreed to participate in the arbitration hearing.

In *Jones Dairy Farm v. Local No. P-1236, United Food and Commercial Workers International Union*, 760 F.2d 173, 175,176 (7th Cir. 1985), we held that "[i]f a party voluntarily and unreservedly submits an issue to arbitration, he cannot later argue that the arbitrator had no authority to resolve it. . . . By going forward with the arbitration without questioning the arbitrator's authority the resolve the dispute, [the company] consented to have [the arbitrator] decide what legal rights in the contracting-out clause meant." However, in the *Jones Dairy Farm* case, we constrasted that situation with a case where a party at the arbitration hearing explicitly reserved its challenge to arbitrability: "[The company] did not, while agreeing to participate in the arbitration, challenge the arbitrator's jurisdiction, and make clear that it was preserving its challenge for eventual presentation to a court if the arbitrator ruled in the union's favor, as in *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 382 (3rd Cir. 1981). The company never questioned the arbitrator's authority." *Jones Dairy Farm*, 760 F.2d at 175 (citation omitted). Unlike the factual scenario in *Jones Dairy Farm*, Fansteel explicitly reserved its objection to arbitrability when it participated in the arbitration hearing, while stating that matters involving the "reclassification of the strikers who were replaced during the strike" were to be decided by "the National Labor Relations Board and not arbitration."

We are thus presented with the question of whether a party who has attempted to preserve its objections to arbitrability nonetheless waives these objections if it participates in an arbitration hearing. Fansteel carefully and explicitly, in unambiguous language, made known to the arbitrator and the union its clear intention that it was maintaining its objections to arbitrability even though it was agreeing to proceed with the arbitration hearing. The Union has not stated that it raised objections during the arbitration hearing to Fansteel's reservation of its right to challenge arbitrability. Fansteel's explicit reservation of rights complies with our language in *Jones Dairy Farm* and in our opinion allows the Company to participate in an arbitration hearing and reserves the Company's right to challenge the arbitrator's authority in a subsequent court proceeding. Futhermore, this approach conforms with both case law, *see, e.g., Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 382 (3rd Cir. 1981); *Northwest Airlines, Inc. v. International Association of Machinists and Aerospace Workers, Air Transport District Lodge No. 143*, 1988 U.S. Dist. LEXIS 14198, at 11-13 (D. Minn. 1988); *R. W. Granger & Sons, Inc. v. Eastern Massachusetts Carpenters and Carpenters Local 275 of the United Brotherhood of Carpenters*, 686 F. Supp. 22, 25-26 (D. Mass. 1988) (cases permitting party to challenge arbitrability in court after proceeding with an arbitration hearing), and the views of commentators in the area of labor arbitration. *See* Elkouri & Elkouri, *How Arbitration Works* 220-21 (4th ed. 1985); Fairweather, *Practice and Procedure in Labor Arbitration* 132 (2d ed. 1983).

Fansteel's right to challenge arbitrability in court following its participation in an arbitration hearing is not only supported in the legal precedent, it also reflects wise public policy. In permitting an arbitrator to attempt to address a dispute prior to a judicial arbitrability determination, parties may well be able to resolve their disputes without requiring the involvement of the judiciary. Futhermore, our upholding of the process does not discriminate in favor of the party who

submits to arbitration of a grievance that it did not initiate subject to a later judicial arbitrability challenge. The party initiating arbitration has made a decision that the dispute is arbitrable when it initiates an arbitration proceeding. If that party felt the dispute was not arbitrable it would have chosen a forum other than arbitration. Thus, permission for the non-initiating party to preserve arbitrability objections following the arbitration hearing merely permits the non-initiating party to make the same decision concerning arbitrability that the initiating party made prior to submission of the decision to arbitrate and does not discriminate against the initiating party. Indeed, such a rule frequently is beneficial to the party who initiated arbitration in allowing that party access to the arbitral process without the necessity of the filing of a lawsuit to compel arbitration.

We are convinced that both precedent and public policy support a rule that permits a party to proceed with an arbitration hearing subject to the right to later challenge the grievance's arbitrability in a judicial forum. Thus, we conclude that Fansteel did not waive its right to contest arbitrability in a judicial forum when it agreed to proceed with the arbitration hearing subject to its arbitrability objections.

III.

We now turn to the question of whether the Union's grievance is arbitrable. "[T]he question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agree to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986). Thus, where one party has clearly preserved the question of arbitrability for judicial determination, and there is no agreement that the arbitrator resolve the issue of arbitrability, we

are called upon to make an independent determination of the arbitrability question. While we note that the arbitrator attempted to decide the arbitrability question, the resolution of this question is our responsibility and we will approach this issue *de novo* without deference to the arbitrator's decision.

The Supreme Court has also recognized that:

> "It has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' [*Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)]. Such a presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of 'any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder . . . ' In such cases '[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.' *Warrior & Gulf, supra*, 363 U.S., at 584-585."

AT&T Technologies, Inc., 475 U.S. at 650 (citation omitted).

In resolving an arbitrability issue the first step in determining coverage under the arbitration clause is to ascertain whether the present dispute falls within the scope of the arbitration clause. The language in the parties' collective bargaining agreement containing the broad arbitration clause allows for the arbitration of any differences "as to the meaning and application of any of the provisions of this Agreement" or over "any other matter relating to rates of pay, wages, hours or other conditions of employment affecting the employees of

the Company." Furthermore, the parties' strike settlement agreement provided as a general matter that "[a]ny dispute arising in the implementation of this Agreement may be referred to the Grievance Procedure of the new Collective Bargaining Agreement or to other appropriate Governmental Agencies." Since the union's grievance alleged contractual violations as a result of the replacement employees' work outside regular job classifications and reclassification, on its face the grievance would appear to fall within the arbitration clause's coverage.

Even when the arbitration clause facially applies to the present dispute, that does not end our inquiry. If we can say with positive assurance that the parties intended to exclude the involved dispute from arbitration, then no obligation to arbitrate will exist. In concluding their strike settlement agreement, the parties were unable to reach an accord with respect to the issue of whether permanent replacements or strikers should be entitled to the positions that permanent replacements occupied during the strike. However, the parties entered into a provision of the strike settlement agreement that stated that "mutual agreement of the parties, or the NLRB, or an agency or a court of competent jurisdiction subject to all rights of appeal and all applicable rules and regulations of the NLRB or such agencies or courts," were to be the methods for determination of the issue of whether permanent replacements had "vacated" positions, thus permitting the return of strikers to these positions. Conspicuously absent from this list of appropriate fora for the resolution of this issue was contractual grievance arbitration.

A reading of the Union's grievance reveals that it was an attempt to resolve in the forum of contractual grievance arbitration the question of whether strikers were entitled to positions occupied by permanent replacements, an issue that the parties had agreed to have resolved in the NLRB and the courts. The grievance was filed on the first day that some strikers returned to work, a timing demonstrating its purpose of securing the return of additional strikers who would

supplant the replacement employees. Even more significantly, the language of the grievance itself stated that: "The Company is using new hires (probationary) and salaried personnel to keep its Union and senior employees from returning to work." Thus, the very language of the grievance illustrated the Union's purpose of attempting to displace permanent replacements with striking employees. Finally, the arbitrator ordered that positions held by allegedly misclassified permanent replacement employees be given to more senior striking employees under the Collective Bargaining Agreement. In our view, this grievance clearly turns upon the question of the rights of permanent replacements and non-reinstated strikers to positions assigned to the permanent replacements during the strike. The parties explicitly reserved and provided that disputes of this nature be heard before the NLRB and the courts rather than in grievance arbitration. Thus, there exists the " 'forceful evidence of a purpose to exclude the claim from arbitration' "[4] that meets the well accepted standard for classifying the grievance as non-arbitrable.

The Union argues that our decision is contrary to the Ninth Circuit's refusal in *Winery Workers Union, Local 186 v. E & J Gallo Winery, Inc.*, 857 F.2d 1353, 1357 (9th Cir. 1988), to " 'give effect to poorly drafted exclusionary clauses.' " (Quoting *Johnson-Tom Bigbee Mfg. Co. v. Local 2462*, 596 F.2d 126, 129 (5th Cir. 1979)). Unlike *Gallo*, where the parties' bargaining history did not contain " 'forceful evidence of a purpose to exclude the claim [at issue] from arbitration,' "[5] as we have thoroughly demonstrated above, the bargaining history in this case clearly reveals that the parties agreed to exclude from arbitration issues involving the rights of permanent replacements and non-reinstated strikers to positions assigned to the permanent replacements during the strike.

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[4] *AT&T Technologies, Inc.*, 475 U.S. at 650 (quoting *Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960)).

[5] *Id.*

The Union also argues that our holding, in effect, improperly grants the replacements "super seniority" permanently immunizing them from the operation of seniority and bumping under the parties' collective bargaining agreement. We disagree. The strike settlement agreement specifically and in unambiguous language manifests the parties' clear intent to exempt from arbitration the question of whether a striker's return to work will displace a permanent replacement employee. As long as a striking employee has been recalled to the active work force, his seniority and bumping rights will operate to give the returning employee the benefit of his seniority rights in any dispute with a replacement employee. *Compare Trans World Airlines v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225, 1231 (1989) ("[O]nce reinstated, the seniority of full-term strikers is in no way affected by their decision to strike."). Only when the grievance is an attempt to secure the return to work of striking employees will it be considered non-arbitrable. We trust that the courts, the party litigants and arbitrators will be able to distinguish between these two situations.

Because the Union's grievance represents an attempt to displace permanent replacement employees with striking employees, a matter that the parties have explicitly reserved for the determination of agencies, such as the National Labor Relations Board, or courts rather than grievance arbitrators, we agree with the finding of the district court that the grievance was non-arbitrable and its decision is

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FANSTEEL, INC., *Plaintiff,* v. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE NO. 1777, *Defendant.*	No. 88 C 9091
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE NO. 1777, *Plaintiff,* v. FANSTEEL, INC., *Defendant.*	No. 88 C 9147

MEMORANDUM OPINION AND ORDER

Fansteel, Inc. ("Fansteel"), a manufacturer of tantalum metal products, has sued International Association of Machinists and Aerospace Workers, Lodge No. 1777 ("Union") to vacate a September 29, 1988 Arbitrator's Opinion and Award (the "Award," FMCS No. 87-25922, Fansteel Complaint Ex. 1). Union has retorted by suing Fansteel for enforcement of the Award. Both parties have now moved for summary judgment in each case under Fed. R. Civ. P. ("Rule") 56. For the reasons stated in this memorandum opinion and order, Fansteel's motion is granted in principal part and Union's is denied to the same extent.

Facts[1]

In May 1987 Fansteel and Union were parties to a collective bargaining agreement ("CBA") due to expire May 31, covering about 80 employees at Fansteel's North Chicago plant. Before May 31 the parties engaged in extensive bargaining sessions but were unable to reach agreement. Fansteel warned Union that in the event of a strike it intended to hire replacement workers and continue operations. Union rejected Fansteel's final offer and went on strike June 1.

Fansteel began to hire replacements — 39 of them. It assigned 31 of the new hires to Labor Grade 8, the entry-level classification.

After intervention of a federal mediator, Fansteel and Union resumed negotiations. In part Union sought the discharge or layoff of the replacements so the strikers could return to work. Fansteel rejected that position.

Before the final negotiation session on July 10 Fansteel prepared a draft Strike Settlement Agreement (Fansteel Complaint Ex. 2[2]). Several of its provisions have particular relevance here:

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[1] Familiar Rule 56 principles impose on the movant the burden of establishing the lack of a genuine issue of material fact (*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, (1986)). For that purpose this Court is called on to draw all "reasonable inferences, not every conceivable inference" in the light most favorable to the nonmovant (*DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 329 (7th Cir. 1987)). Where as here cross motions are involved, that principle demands a dual perspective (which might sometimes cause the denial of both motions). In this instance, however, few facts are in dispute — and where they are, the ultimate ruling in Fansteel's favor has caused the evidence to be looked at from a pro-Union viewpoint.

[2] That exhibit comprises five pages, the last three of which reflect the typed version originally submitted by Fansteel and the first two of which contain handwritten inserts later agreed upon by the parties. This opinion will follow the parties' usage in referring to the numbered paragraphs of Fansteel's draft and the ultimate agreement as "Items."

2. Jobs filled by employees hired by the Company on or after June 1, 1987 as replacements for striking employees (new hires) shall not be considered vacancies to which returning strikers shall be returned unless and until such jobs are vacated by the strike replacements. Such new hires shall not be bumped or displaced by the return of strikers. Such newly-hired employees shall become members of the Union(s) as stated in the Collective Bargaining Agreement and their respective seniorities shall be measured from their individual hire date.

3. A newly-hired employee shall not be "displaced" or "bumped" as a result of an employee returning to work after an illness or injury leave of absence (industrial or non-occupational). The returning employee may exercise his/her seniority affecting other employees other than those newly-hired and otherwise in conformance with the Collective Bargaining Agreements(s).

* * *

13. The Company and the Unions, on behalf of themselves and bargaining unit members, agree that no grievances, arbitrations, lawsuits, NLRB unfair labor practice charges, or any other claims shall be filed by the Company against the Unions or by the Unions against the Company concerning any action or omission arising in collective bargaining negotiations or during the period of the strike.

14. The Company and the Unions agree that neither of them shall take any action against an employee because he participated in or failed to participate in the strike.

15. Any dispute arising in the implementation of this Agreement shall be referred to the Grievance Procedure of the new Collective Bargaining Agreement.

Union rejected the draft as tendered. Further negotiations resulted in a number of handwritten changes that found their way into the final Settlement Agreement (the "Agreement"[3]):

1. Draft Items 2 and 3 remained physically in the Agreement, but the parties added this marginal note:

> Items 2 and 3 represent the position of the Company and are not agreed to by the Union or waived by the Company.

2. This unnumbered new paragraph was inserted immediately after Item 3:

> The rights as stated in items 2 and 3, if any, of the persons put to work after the start of the strike will be determined by mutual agreement of the parties, or the NLRB or an agency or a court of competent jurisdiction subject to all rights of appeal and all applicable rules and regulations of the NLRB or such agencies or courts.

3. Draft Item 13 was deleted entirely.

4. This sentence was added to draft Item 14:

> Any action by the Union or any employee taken before the NLRB or court concerning the persons put to work after the start of the strike is not prohibited by this item 14.

5. In Item 15 the word "shall" was changed to "may" and a key addition (indicated by emphasis in the following quotation) was made, so that the final version read this way:

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[3] Exhibit 1 to this opinion reproduces the Agreement (Fansteel Complaint Ex. 3).

> Any dispute arising in the implementation of this Agreement may be referred to the Grievance Procedure of the new Collective Bargaining Agreement *or to other appropriate Governmental Agency.*

Union ended the strike July 11, and the parties entered into two contracts: the new CBA[4] and the Agreement. On July 13 Union filed an unfair labor practice charge with NLRB. On July 15 approximately 30 of the strikers returned to work. That same day Union filed the grievance at issue here, charging (Fansteel Complaint Ex. 5, copied verbatim):

> The Company is using new hires (probationary) and salaried personnel to keep it's Union and senior employees from returning to work.
>
> This is a violation of the current collective bargaining agreement, and i in particular, articals 16-6-10-& 22 as well as the letters on pages 111-112-113-118- and 119.[5]
>
> We demand that any employees affected by this violation be compensated for all losses suffered.

Fansteel and Union representatives met July 21. Union spokesman Richard Globis explained that Fansteel was violating the CBA by using new hires classified as Labor Grade 8 to do work that Labor Grade 8 employees could not perform (Award at 7-8). On July 28 Fansteel responded (*id.* at 8):

> The Company will classify the "new hires" in the job classifications appropriate for the work the "new hires" were hired to do and have been performing.

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[4] According to Award at 7, the new CBA was retroactive to June 1.

[5] [Footnote by this Court] Those references to contract provisions were to the expired CBA (the new one had not yet been printed). Award at 7 n.*** says the corresponding page references in the new CBA are pages 80, 81-82 and 87-88.

> This classification will be effective as of the hire date of each of the "new hires," respectively.

Fansteel then upgraded all the replacements in Labor Grade 8 to the next higher grade in each department (either Labor Grade 6 or 5). These upgrades were performed administratively, without any job postings or bidding.

On August 4 Union demanded arbitration of the grievance. On August 28 NLRB's Regional Director dismissed Union's unfair labor practice charge. On April 14, 1988 NLRB's General Counsel denied Union's appeal of that dismissal.

On April 15, 1988 Arbitrator Aaron Wolff conducted the arbitration hearing (the "Hearing"). At the outset Fansteel argued the dispute was not arbitrable (Award at 16):

> To the extent that this grievance arises concerning the implementation of the strike settlement agreement, it is clearly arbitrable. However, to the extent that the union is seeking in this grievance the reinstatement of the strikers who were replaced by permanent replacements during the strike, such relief is clearly not authorized by the collective bargaining agreement or strike settlement agreement which expressly recites the parties failure to reach agreement on reinstatement and which expressly provides for a forum to decide that dispute, which would be the National Labor Relations Board and not arbitration.
>
> Therefore, any award of the relief that the union appears to be seeking in this case would be beyond the scope of the collective bargaining agreement and would not be legal and to that extent we believe that what the union is seeking is not authorized by the collective bargaining agreement.
>
> We are willing to let the arbitrator make that determination in the first instance. However, we want to

> make it clear that we are in no way submitting to the arbitrator the question of the lawfulness of the union's [sic] hiring permanent replacements, which is an issue for the National Labor Relations Board.

Fansteel then proceeded with the Hearing and addressed the merits of Union's claim.

In part Arbitrator Wolff's comprehensive opinion said (Award at 15):

> While it is no doubt true that courts may have the final say on the substantive arbitrability, a party may raise this issue before an arbitrator without waiving its right to court review of that issue at least where, as here (R. 5-6), the party stakes out its position or objection at the outset of the arbitration hearing.

After rejecting Union's waiver argument, the Arbitrator identified the issues Union had submitted to arbitration in these terms (*id.* at 19-20):

> 1. Did the Company violate the CBA in the manner in which it used the new hires after the strike was over and before it reclassified them?
>
> 2. Did the Company violate the CBA or the SSA in the manner in which it reclassified and upgraded the new hires on or about July 28?
>
> 3. Did the Company, after the strike was over and the CBA was in effect, use foremen to perform bargaining unit work in violation of the CBA?
>
> 4. If the Company did violate provisions of the CBA or the SSA, what remedies are appropriate under the circumstances?

Then Arbitrator Wolff held those issues arbitrable under CBA Art. 13 and Agreement Item 15 (*id.* at 20) and proceeded to the merits.

As to the substantive issues, the Arbitrator found for the Union in all respects:

1. He found the new hires were performing work outside of their job classifications.

2. He found Fansteel had violated the CBA and the Agreement when it unilaterally upgraded the replacements.

3. He found Fansteel had also violated the CBA by using foremen to perform bargaining unit work.[6]

By way of remedy, Arbitrator Wolff ordered Fansteel to post for bidding all job positions into which Fansteel had upgraded the replacements. Employees entitled to those positions were to "be made whole for any loss of earnings sustained" (Award at 40). Finally, the foremen were ordered to stop performing bargaining unit work.

Positions of the Parties

Fansteel advances a multi-pronged attack on the Award:

1. It should be vacated because the grievance was not arbitrable.

2. Alternatively it should be vacated because it does not draw its essence from the parties' agreement.

3. Its mandated remedy exceeded the Arbitrator's authority.

Union responds in these terms:

1. Fansteel waived the arbitrability issue by proceeding with the Hearing.

2. Even apart from any arguable waiver, the dispute is arbitrable.

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[6] Fansteel does not challenge this finding (Fansteel Mem. 1 n.1). Accordingly this third issue is not before this Court.

3. Both the Award and the remedy draw their essence from the parties' agreement.

4. Rule 11 sanctions should be imposed on Fansteel for challenging the Award.

This opinion necessarily deals with the arbitrability question at the outset.

Is the Dispute Arbitrable?

Any discussion of arbitrability must begin with the seminal case in the area. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986). Drawing upon the *Steelworkers Trilogy* principles, *AT&T Technologies* (*id.* at 649, citations omitted) left no doubt as to who is to decide arbitrability:

> [T]he question of arbitrability — whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance — is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

Most frequently a party who claims a dispute is not arbitrable will refuse to proceed with the arbitration hearing. That forces the other party to file suit and to obtain, consistently with *AT&T Technology*'s teaching, a court determination as to arbitrability. If the court finds the dispute subject to arbitration, it can then compel the party opposing arbitration to proceed with that remedy.

Fansteel took a different route. It specifically urged Union's dispute was not arbitrable. It nevertheless proceeded with the arbitration hearing, allowing the Arbitrator to decide arbitrability in the first instance (but clearly indicating it was not waiving its right to a later court determination). Union

Mem. 5 says that by proceeding in that manner Fansteel has "waived its right to contest arbitrability in this Court."

But the case law uniformly rejects any such notions of waiver. Though our own Court of Appeals has never addressed the issue directly, this Court will of course treat with the message gleaned from Seventh Circuit opinions before turning elsewhere.

Two Seventh Circuit statements, albeit in dicta, clearly convey the message that a party can proceed with an arbitration hearing while reserving the arbitrability issue for later court determination. *Jones Dairy Farm v. Local No. P-1236, United Food and Commercial Workers International Union, AFL-CIO*, 760 F.2d 173 (7th Cir. 1985) held an employer had waived the arbitrability issue by proceeding with the hearing without protest. But in the course of that decision the court said (*id.* at 175):

> But Jones Dairy Farm did not make it [arbitrability] an issue. It did not, while agreeing to participate in the arbitration, challenge the arbitrator's jurisdiction, and make clear it was preserving its challenge for eventual presentation to a court if the arbitrator ruled in union's favor, as in *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 382 (3d Cir. 1981). See Gorman, Basic Text on Labor Law 587 (1976). The company never questioned the arbitrator's authority.
>
> If a party voluntarily and unreservedly submits an issue to arbitration, he cannot later argue that the arbitrator had no authority to resolve it.

Just one year later *Dreis & Krump Manufacturing Co. v. International Association of Machinists and Aerospace Workers, District No. 8*, 802 F.2d 247 (7th Cir. 1986) again found a

waiver in the employer's having failed to reserve arbitrability. And once again the court said (*id.* at 252):

> [B]y consenting to submit the grievance to arbitration without any reservations, the company waived the argument that is the premise of its suit — that the arbitrator acted outside of his jurisdiction. The company's argument on the merits is that the management-rights clause in the collective bargaining agreement is so broad that it makes a decision to subcontract work nonarbitrable. But if this is so the company should either have refused to arbitrate the dispute, thus forcing the union to bring a suit to compel arbitration — a suit in which the district court would decide the issue of arbitrability — or have submitted to arbitration under protest. By failing to do either of these things it admitted that the subject of subcontracting was within the scope of the clause. See *Jones Dairy* . . . and cases cited there; *Teamsters Local Union No. 764 v. J.H. Merritt & Co.*, 770 F.2d 40, 43 (3d Cir. 1985).

Those cases reflect the same principle as do square holdings from at least one Court of Appeals (*Wilkes-Barre*, cited in *Jones Dairy*, and other Third Circuit cases cited at 647 F.2d at 382) and several District Courts as well (see, e.g., *Northwest Airlines, Inc. v. International Association of Machinists and Aerospace Workers, Air Transport District Lodge No. 143*, 1988 U.S. Dist. LEXIS 14198, at 11-13 (D. Minn.); *R.W. Granger & Sons, Inc. v. Eastern Massachusetts Carpenters and Carpenters Local 275 of the United Brotherhood of Carpenters and Joiners of America*, 686 F.Supp. 22, 25-26 (D. Mass. 1988)), as well as dicta elsewhere (see, e.g., *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1*, 611 F.2d 580, 584 (5th Cir. 1980); *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 117 v. Washington*

Employers, Inc., 557 F.2d 1345, 1350 (9th Cir. 1977)).[7] And that view is shared by commentators (see Elkouri and Elkouri, *How Arbitration Works* 220-21 (4th ed. 1985); Fairweather, *Practice and Procedure in Labor Arbitration* 132 (2d ed. 1983)).

Both Seventh Circuit dicta antedated *AT&T Technologies*, and the same is true of the other just-cited Court of Appeals decisions and treatises. But the principle they enunciate is not adversely impacted by the result in *AT&T Technologies*, so the line of authority they exemplify seems unimpaired.

There are, to be sure, some disquieting aspects of that notion — aspects that seem not to have been fully aired by the opinions voicing it.[8] But given the clear existing signals from our Court of Appeals, it would be entirely unfair to change the rules on Fansteel now. After all, the very reason that continuity is important in the law — the underlying reason for the whole concept of following precedent — is to assure predictability for the consequences of a party's conduct. Where Fansteel has followed the path specifically marked out by the highest legal authority in whose jurisdiction it functions, it should not now be told it was following a false prophet and has waived the right it so carefully sought to preserve. Little wonder that Arbitrator Wolff himself found Union's waiver argument unpersuasive (Award at 15, quoted in the "Facts" section of this opinion). This Court agrees.[9]

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[7] Not surprisingly, a like dictum has also emanated from the one Court of Appeals that has decided the issue squarely (*Teamsters Local Union No. 764 v. J.H. Merritt and Co.*, 770 F.2d 40, 43 (3d Cir. 1985) (quoting *Jones Dairy*)).

[8] See discussion in the Appendix.

[9] This holding obviates the need to address another question: What would be the appropriate standard of review of the arbitrator's decision on arbitrability? On that issue, see the general discussion in *Jones Dairy*, 760 F.2d at 176.

This opinion therefore turns to an independent evaluation of the arbitrability issue. *AT&T Technology*, 475 U.S. at 650 (citations omitted) summarizes the controlling standards for courts asked to decide whether a particular dispute is arbitrable:

> Finally, it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. " . . . Such a presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder . . . ." In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

Two potential sources of arbitrability exist here — the CBA and the Agreement. CBA Article 13 provides (Fansteel Complaint Ex. 4, at 43, 45):

> Should any employee feel aggrieved by any matter arising out of his employment by the Company, or should any differences arise between the Company and the Union
>
> (a) as to the meaning and application of any of the provisions of this Agreement, or

(b) respecting any other matter relating to rates of pay, wages, hours or other conditions of employment affecting the employees of the Company

an earnest effort shall be made by all of the parties to settle such grievances or differences promptly by means of the following procedure, and there shall, under no circumstances, be any suspension of work on account of such grievances or differences.

* * *

Step 4

If the decision rendered by the Director of Industrial Relations is not productive of a satisfactory settlement, the controversy shall be submitted to arbitration. Within ten (10) working days after receipt of such request and the naming of an arbitrator by the party initiating the arbitration, the other party shall by notice in writing to the party seeking arbitration designate a second arbitrator. The two (2) arbitrators so designated by the parties shall meet promptly and agree upon a third arbitrator and shall proceed with all reasonable expedition to decide the controversy. The decision of the majority of the three (3) arbitrators so designated shall be binding on both parties.

And as quoted earlier, Agreement Item 15 says:

> Any dispute arising in the implementation of this Agreement may be referred to the Grievance Procedure of the new Collective Bargaining Agreement or to other appropriate Governmental Agency.

CBA Article 13 is the classic arbitration clause — all-encompassing ("any matter" or "any differences") and providing an exclusive remedy. Agreement Item 15 is not — though it does extend to "any dispute," it (especially taken in

context) plainly contemplates that some disputes will be referable to arbitration while others will not.

That being the case, *AT&T Technologies* teaches any matter to which the CBA applies is entitled to a "presumption of arbitrability" and any "[d]oubts [are] resolved in favor of coverage." Certainly such presumption and doubt-resolution, if applicable at all, would appear less strong to the extent that Agreement Item 15 is the potential source under examination. Nonetheless Union will be given the benefit of the doubt even in that respect, and this opinion will proceed on the premise that the disputes in issue are nonarbitrable *only* if:

1. the Agreement contains an express provision excluding the grievance from arbitration or

2. the Agreement provides the "most forceful evidence" of a purpose to exclude.

Fansteel appears to contend the Agreement meets both those *AT&T Technologies* alternatives. Its R. Mem. 6 says the previously-quoted paragraph inserted below Agreement Item 3 constitutes an express exclusion:

> The rights as stated in items 2 and 3, if any, of the persons put to work after the start of the strike will be determined by mutual agreement of the parties, or the NLRB or an agency or a court of competent jurisdiction subject to all rights of appeal and all applicable rules and regulations of the NLRB or such agencies or courts.

Fansteel Mem. 8 says arbitration was purposely not added to that paragraph because "there was no agreement on the issues described in Item 2, and therefore nothing for an arbitrator to apply." To support its position Fansteel also points to the earlier-quoted final language of Agreement Item 15 and then says (Mem. 10):

> On its face, the Strike Settlement Agreement clearly reserves for the NLRB or courts, and removes from

> arbitration, any claim that would jeopardize the replacements' status as permanent, either by claiming that the replacements' positions constitute vacancies, or by seeking that replacements be bumped or displaced by strikers.

No doubt the Agreement was inartfully put together in the pressure cooker of final negotiation — it was a patchwork quilt of marginal notations and handwritten paragraphs marked for insertion, rather than the seamless web that might be hoped for from teams of lawyers working in their office environments, with ready access to word processors and with the time and capacity for extended review and editing. But its message comes through loud and clear: Claims or disputes involving the rights of the replacement workers are *not* to be arbitrated under the CBA's grievances. That is best demonstrated and understood by reviewing the bidding in the negotiations ending the strike.

In its initial draft Agreement Fansteel sought to destroy Union's position as to the new hires. Its Items 2 and 3 would have insured that those replacements would not be replaced by returning strikers.

Union balked at that unconditional-surrender position. It understandably wanted Fansteel to terminate or lay off the replacements to make room for the strikers. When Fansteel in turn rejected that polar-opposite stance, the parties agreed to disagree. Enter the two new inserts — the marginal note opposite Items 2 and 3 and the paragraph following Item 3:

> 1. As for the marginal note, it expressly said Items 2 and 3 remained Fansteel's position but were flatly opposed by Union.
>
> 2. Then the newly-inserted paragraph defined the procedural mechanism for resolving the total disagreement over Items 2 and 3. It may fairly be paraphrased, without any alteration in meaning, in these terms:

> If the replacement have any rights (and Union doesn't agree that they do), those rights will be decided in any one of three ways:
>
> (a) by mutual agreement between Fansteel and Union;
>
> (b) by the NLRB or other agency; or
>
> (c) by a court.

Grievance and arbitration are conspicuously absent from that list of avenues for resolving the respective rights of the new hires and the returning strikers. In the circumstances, that is just as express an exclusion as if the words "but not grievance and arbitration" had been coupled with the designation of the three available routes. And that clear reading is buttressed by at least two other changes in the Agreement.[10]

First, draft Item 14 originally read (Fansteel Complaint Ex. 2):

> The Company and the Unions agree that neither of them shall take any action against an employee because he participated in or failed to participate in the strike.

In the final version the parties added this sentence (*id.* Ex. 3):

> Any action by the Union or any employee taken before the NLRB or court concerning the persons

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[10] In addition to the two changes next discussed in the text, draft Item 13 — deleted from the final Agreement — must also be viewed as significant. In itemizing the avenues that Fansteel and Union could not pursue after the strike, Fansteel-proposed Item 13 specifically referred to grievance and arbitration as well as to lawsuits and NLRB unfair practice charges. That being so, it can scarcely be viewed as accidental that the parties' negotiated insert that followed Item 3 in the ultimate Agreement referred to the latter two avenues of possible remedy but *not* to grievance or arbitration. That omission parallels the omission from Item 14, discussed in the next paragraph of the text.

> put to work after the start of the strike is not prohibited by this item 14.

That sentence, which centers on the rights of the replacement workers, again omits any reference to grievance and arbitration. Thus Item 14 too permits claims by Union or any employee, but *only* before NLRB or a court.

Finally, because the inserted paragraph had addressed the *procedures* available to resolve the open substantive dispute over the respective rights of the two groups, a corresponding change was necessary — and was made — in Item 15. Initially draft Item 15, then part of a document that nailed down the coffin on any claim of returning strikers to bump the new hires, had committed the resolution of any disputes under the Agreement to the grievance and arbitration machinery of the new CBA. But with the rights of the contending groups now left unresolved, and with the mechanisms for resolving those rights now being specified as everything *but* grievance and arbitration, the final form of Item 15 was changed to say that disputes under the Agreement:

> may be referred to the Grievance Procedure of the new Collective Bargaining Agreement or to other appropriate Governmental Agency.

Again there is only one obvious reason for changing the "shall" to "may" and adding the phrase "or to other appropriate Governmental Agency": As a result of the insert following Items 2 and 3, the grievance-arbitration route was no longer the sole method of dispute resolution. Because that was so, the remedies provision of Item 15 had to be altered to

specify another available path: resort to an "appropriate Governmental Agency."[11]

Thus Item 15, in its final version, meshes perfectly with the Agreement's new paragraph following Item 3. Disputes as to the replacement employees are *not* arbitrable, but instead — if not resolved by the parties' mutual agreement — must be tendered to NLRB or directly to the courts (whichever is the "appropriate Governmental Agency"). Indeed, no other reading of the Agreement gives effect to *all* its provisions.

In sum, the paragraph inserted after Item 3 is an express provision excluding from CBA grievance and arbitration all disputes about the replacement workers. Union agreed to that provision and must now live with the consequences. And a reading of the entire Agreement in the context of the bargaining history presents "forceful evidence of a purpose to exclude the claim from arbitration" (*AT&T Technologies*, 475 U.S. at 650).

It remains only to consider whether the grievance submitted to the Arbitrator in fact concerned the rights of the new hires. If so, the Agreement makes it nonarbitrable.

That question requires little discussion. Fansteel challenges the Arbitrator's first two conclusions here:

1. that Fansteel violated the CBA by using the replacement workers outside of their assigned labor grade and

2. that Fansteel also violated the CBA when it unilaterally reclassified and upgraded the replacements.

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[11] "Governmental Agency" may seem an odd locution to describe the possibility of going to the *courts* as well as NLRB. But when juxtaposed to the private remedy involved in resorting to a grievance procedure followed by a parties-selected arbitrator, the labor negotiators' choice of "Governmental Agency" to lump two governmental labor-dispute resolvers (courts and NLRB) is not quite as peculiar as it strikes a judge — or lawyer — on first reading.

Both those issues clearly involve "the rights as stated in items 2 and 3, if any, of the persons put to work after the start of the strike" (the stated scope of the inserted paragraph): They directly address the availability of jobs for the new hires vis-a-vis the strikers. It will be recalled that Union returned from the strike and immediately challenged the manner in which Fansteel was utilizing the replacements. Union's central claim was that lower labor grade replacements were assigned to do work normally performed by higher rated employees in an attempt to prevent strikers from returning.

Fansteel responded that the replacements were always doing the same work and that if Union's grievance centered on out-of-classification violations, Fansteel would remedy that by retroactively upgrading the employees. It was at that point that Union contended the upgrading also violated the CBA.

This Court is of course mindful of the admonition in *AT&T Technologies*, 475 U.S. at 649:

> [I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.
> No effort has been made here to delve into the merits of the underlying dispute. Instead this opinion has examined the issues submitted by Union, as framed and analyzed by the Arbitrator, and concludes they directly involve the rights of the replacement workers. As such they are excluded from arbitrability by the Agreement.[12]

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[12] This conclusion makes it unnecessary to consider Fansteel's two remaining arguments: that the Award does not draw its essence from the Agreement and that the remedy exceed the Arbitrator's authority.

Rule 11

Union Mem. 13 says sanctions are warranted against Fansteel under Rule 11. Even had this Court reached a conclusion opposite to that reflected by this opinion, the substantial body of authority supporting Fansteel's reservation of the arbitrability issue and the nature of the substantive case law as to arbitrability would have precluded any potential for finding a Rule 11 violation.

Quite the contrary is true. Union's brief (only one page) and ill-considered Rule 11 motion — symptomatic of the infectious sanctions-seeking disease that threatens to reach epidemic proportions in the legal profession — is itself suspect (see *Foy v. First National Bank of Elkhart*, No. 88-2264, slip op. at 12 (7th Cir. Feb. 8, 1989) ("A frivolous request for sanctions is itself sanctionable").

This should not be mistaken as an invitation to Fansteel. Union's motion is denied, and no cross-motion by Fansteel will be entertained.

Conclusion

As is the situation recently presented to our Court of Appeals in *International Association of Machinists and Aerospace Workers, Progressive Lodge No. 1000 v. General Electric*, 1989 U.S. App. LEXIS 643 (7th Cir.), the parties here clearly contracted to exclude from arbitration the very dispute that Union has tendered to the Arbitrator. There is no genuine issue of material fact as to any of the questions posed in these two cases. Except to the extent stated in the next paragraph, Fansteel is entitled to a judgment as a matter of law in each case.

In Case No. 88 C 9091 the portions of the Award challenged by Fansteel — the entire Award except the portion that finds foremen had performed bargaining unit work in violation of the CBA — are vacated. In Case No. 88 C 9147

Union is denied enforcement of the Award except with respect to that same finding as to the foremen. Union's Rule 11 motion is denied in both cases.

Milton I. Shadur
United States District Judge

Date: February 28, 1989

EXHIBIT 1

Strike Settlement Agreement
Between

Fansteel Inc., (hereinafter called the "COMPANY") and Local Lodge 1777 International Association of Machinists and Aerospace Workers AFL-CIO; Local Union No. 93 of the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; Local Union 150 of the International Brotherhood of Electrical Workers; and Lake County Local Union No. 250 of the International Brotherhood of Carpenters & Joiners of America (hereinafter called the "UNIONS");

WHEREAS, the parties hereto are about to execute Collective Bargaining Agreement(s) effective June 1, 1987.

NOW, THEREFORE, in consideration of the execution of the said Collective Bargaining Agreement(s), the parties have executed this Agreement to become effective concurrently with the new Collective Bargaining Agreement(s).

1. The strike against Fansteel Inc. by the Company's employees who are members of one of the Unions is terminated as of the date of this Agreement. Striking employees shall be returned to work to openings in the classifications occupied by the employee on May 31, 1987, in accordance with their respective seniority, and the recall provisions of the Collective Bargaining Agreement(s) shall determine the order of return to work.

2. Jobs filled by employees hired by the Company on or after June 1, 1987 as replacements for striking employees (new hires) shall not be considered vacancies to which returning strikers shall be returned unless and until such jobs are vacated by the strike replacements. Such new hires shall not be bumped or displaced by the return of strikers. Such newly-hired employees shall become members of the

Union(s) as stated in the Collective Bargaining Agreement and their respective seniorities shall be measured from their individual hire date.

3. A newly-hired employee shall not be "displaced" or "bumped" as a result of an employee returning to work after an illness or injury leave of absence (industrial or non-occupational). The returning employee may exercise his/her seniority affecting other employees other than those newly-hired and otherwise in conformance with the Collective Bargaining Agreement(s).[13]

The rights as stated in items 2 and 3, if any, of the persons put to work after the start of the strike will be determined by mutual agreement of the parties, or the NLRB or an agency or a court of competent jurisdiction subject to all rights of appeal and all applicable rules and regulations of the NLRB or such agencies or courts.

4. Employees who prior to the strike were employees of the Company but subsequent to the strike have resigned or retired shall not be returned to work.

5. It is recognized that all employees may not be returned to work at the same time or on the same date.

6. A designated representative of the Unions and a designated representative of the Company shall work together to notify employees of the end of the strike and the date and time when each returning employee is to report to work.

7. All grievances filed and unresolved during the term of the Collective Bargaining Agreement dated effective June 1, 1984, will be honored by the Company and shall be processed in accordance with the terms of the Collective Bargaining Agreement dated effective June 1, 1984.

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[13] Items 2 and 3 represent the position of the Company and are not agreed to by the Union or waived by the Company.

8. The Seniority Dates of striking employees shall remain the same as were recorded on the records of the Company on May 31, 1987

9. Striking employees shall not be compensated in any form for the time on strike.

10. For purposes of the establishment of seniority as an employee of the Company, or for purposes of progression within the rate range of a job, the period of the strike shall be excluded. For example, if an employee had ten days remaining of his "Probationary Period" on May 31, 1987, he shall have ten days remaining of his "Probationary Period" as of the date he returns to work. The "Probationary Period" for newly-hired employees shall be measured from the date this Agreement is executed, provided, however, they shall not be deemed to be probationary employees for purposes of Article 10, Section F of the new Collective Bargaining Agreement.

11. The Company shall reinstate the group insurance program for returning striking employees who did not keep their insurance in force effective on the date of return. Those returning employees who have kept their insurance by paying the premium for it will receive a refund of the excess premium they have paid (dependents and employee coverage). The excess premium covers the period after the striking employee returns to work. Those employees not returning who have kept their insurance by paying the premium for it remain insured by continuing to pay the premium for it.

12. Employees who requested and received vacation pay for vacations earned May 31, 1987, to be taken on or after June 1, 1987, shall be deemed to have taken their vacation for the vacation year starting June 1, 1987, provided such an employee who was eligible for more than two weeks vacation will be permitted to take up to an additional two weeks of vacation without pay.

14. The Company and the Unions agree that neither of them shall take any action or discriminate against an

employee because he participated in or failed to participate in the strike. Any action by the Union or any employee taken before the NLRB or court concerning the persons put to work after the start of the strike is not prohibited by this item 14.

15. Any dispute arising in the implementation of this Agreement may be referred to the Grievance Procedure of the new Collective Bargaining Agreement or to other appropriate Governmental Agency.

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties hereto in the City of Waukegan, Illinois, this 11th day of July, 1987.

LOCAL LODGE 1777

LOCAL UNION 93

LOCAL UNION 150

LOCAL UNION 250

FANSTEEL INC.

Appendix

As this opinion reflects, the authorities — including two dicta from our Court of Appeals — support the result followed in the text, allowing a party simultaneously to reserve its objections to arbitrability while proceeding on the merits before the arbitrator. But that doctrine is troublesome in analytical terms, and this Appendix therefore addresses an aspect not really confronted by the controlling authorities and the commentators in the area.

We begin with the premise now established by *AT&T Technologies*: Courts and not arbitrators are to decide the underlying question of arbitrability. That means an arbitrator's determination that a dispute is arbitrable, arrived at en route to deciding that dispute on the merits, is subject to a wholly fresh judicial look, unfettered by the constraints imposed on judicial review of arbitrators' decisions on the merits.

But the duty to arbitrate is of contractual origin (*AT&T Technologies*, 475 U.S. at 649), and parties are surely free to contract away their right to a judicial determination of whether that duty exists. Even if parties have not committed themselves in writing to the arbitration of certain questions, they are surely free to submit even the arbitrability issue to the arbitrator should they so choose (see, e.g., *Johnson v. United Food and Commercial Workers, International Union Local No. 23*, 828 F.2d 961, 964-65 (3d Cir. 1987)). And that being so, there seems little reason in principle to give a party the opportunity to ask for an arbitrator's decision on the merits while holding in reserve the underlying arbitrability question if the merits argument proves unpersuasive.

Some authorities justify that result by analogy to subject matter jurisdiction. Arbitrators, like federal judges, have limited spheres of decision. Our charter is what Article III and Congress have conferred, while theirs is what the parties have

conferred by contract. And so it is, for example, that Fairweather, *Practice and Procedure in Labor Arbitration* 132 (footnote omitted) puts the matter in these terms:

> Since the issue of nonarbitrability goes to the issue of the arbitrator's jurisdiction, the better rule would appear to be that participation in the arbitration does not constitute a waiver. Such a rule would conform to the general judicial rule that lack of subject-matter jurisdiction is never waived.[14]

But that draws on a false analogy. As any first-year law student knows, subject matter jurisdiction is not waivable. Every court is obligated to dismiss a case on its own motion if it discovers it lacks subject matter jurisdiction. And if a court proceeds in the absence of jurisdiction, what it does is a nullity — it may be undone by that court itself, or on the motion of the losing (or, for that matter, the winning) litigant, or by a reviewing court, either at the behest of a party or on *its* own motion (see, e.g., *Ross v. Inter-Ocean Insurance Co.*, 693 F.2d 659, 663 (7th Cir. 1982)). No consent by a litigant can cure an absence of subject matter jurisdiction.

That is not at all true of the arbitration situation, else (for example) such cases as *Dreis & Krump* would not be examining whether a party had "waived" the argument of the arbitrator's lack of authority "by consenting to submit the grievance to arbitration without any reservations" (802 F.2d

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[14] [Footnote by this Court] See generally *Local 719, American Bakery and Confectionery Workers of America, AFL-CIO v. National Biscuit Co.*, 378 F.2d 918, 921 (3d Cir. 1967).

at 252).[15] And what that means is that the doctrine under examination here gives only one side the ability to challenge the arbitrability issue. Here Union invoked the arbitration process by submitting the grievance to arbitration. Under the *Jones Dairy-Dreis & Krump* analysis, it waived any objection to arbitrability. Had it lost before the arbitrator, then, it could not have then come before this Court and advanced Fansteel's current position — that the dispute was not arbitrable (and hence should be decided by some other authority in the first instance).

Because the rule thus cannot find its support in principles of jurisdiction, some other policy justification must be identified. One obvious candidate is the potential conservation of resources — perhaps what Judge Posner alluded to in *Jones Dairy*, 760 F.2d at 175:

> It is desirable to put as much of the case as possible to the arbitrator, and not encourage parties to go to court before the arbitration can begin.

Indeed, Union Mem. 6 grants some force to preserving the arbitrability objection while simultaneously proceeding with the hearing:

> That procedure may have merit. In theory, an insubstantial grievance could be disposed of in arbitration in less time and for less money than it would take to establish in court that it was not arbitrable.

But any such saving of resources presumes victory on the merits by the party challenging arbitrability. If that party

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[15] True enough, *Dreis & Krump* (and *Jones Dairy* too) use the word "jurisdiction" in referring to the arbitrator's authority to decide a dispute. But that must be viewed as merely a convenient shorthand for the arbitrator's absence of power to resolve the issue unless the parties agree *or* are barred (say by waiver) from challenging that power. Mutual agreement may be viewed as the parallel of subject matter jurisdiction in the limited sense that the parties' agreement is the very fount of the arbitrator's power, but waiver cannot claim such a parallel.

loses before the arbitrator, it will go directly to court to challenge the arbitrability decision. And if that challenge proves successful, instead of any conservation of resources there will have been a *waste* of resources: All that has taken place before the arbitrator will have gone for naught.[16]

As against the prospect of a sometimes-realized conservation of resources by permitting the reservation of the arbitrability issue while going to the arbitration mat on the merits, it is hard to ignore the inherent unfairness in allowing a party thus to engage in a "heads I win, tails you lose" game. It certainly seems inequitable to allow Fansteel to object to arbitrability and still proceed with the merits of the dispute: If it wins on the merits, it will cheerfully forget its argument that the matter should never have gone to the arbitrator in the first place — while if it loses on the merits it remains free to urge that argument on a court with full vigor and to obtain a de novo judicial decision on that issue and, even more importantly, to get a fresh shot at the merits as well. Thus to focus on the merits alone, had Fansteel won on those issues it would derive the benefit of the narrow judicial review accorded to arbitrators' decisions on the merits, but its loss on the merits has subjected it to none of the disadvantages of limited judicial review.

On the other side of the coin, Union enjoys no such luxury. Because it brought the issues to the arbitrator in the first instance, a loss before the arbitrator on the merits would leave it entirely bound on the arbitrability question and also seriously bounded by the scope of judicial review on the substantive issues. Conversely, an arbitral victory on the merits would leave it vulnerable to de novo judicial review on the

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[16] This may be a slight oversimplification. In some cases it is possible that an arbitrator's first crack at the issues could facilitate the court's resolution of the arbitrability question, as by framing the issues with the benefit of any special expertise the arbitrator may bring to the table. But that possibility is speculative at best.

arbitrability question *and*, if it were to lose that, on the merits issues as well.

It could be said, of course, that Union's course of action was entirely volitional, and that in free-market terms it cannot complain of the consequences of its choice. But that result, if generally understood, would surely lead to fewer submissions to arbitrators whenever any doubt exists as to arbitrability. And that it turn is at odds with the strong public policy favoring arbitration (see *IAM v. General Electric*, 1989 U.S. App. LEXIS 643, at 2-4). Such a result hardly "furthers the national labor policy of peaceful resolution of disputes" (*AT&T Technologies*, 475 U.S. at 650, quoting *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371-72 (1984)) or is consistent with "the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements" (*id.* at 651).

Were this Court writing on a clean slate, it would therefore hold no party should be free to go to arbitration on the merits while holding in reserve an argument of nonarbitrability. Whatever the initial scope of the parties' agreement to arbitrate may have been, if both thereafter pose an issue for decision by the arbitrator they should be held to have regarded that issue as within that scope — or alternatively to have enlarged the scope to embrace that issue. Such a rule, under which a party would understand that as the necessary consequence of any submission of a merits issue to the arbitrator, would do no violence to the teaching of *AT&T Technologies*, 475 U.S. at 649 (citations omitted):

> Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

As the text of this opinion reflects, to impose such a rule on Fansteel in the first instance would work a serious injustice — it would defeat justifiable expectations based on what

courts had said about the matter earlier. And although the concept of avoiding advisory opinions is on the whole a salutary one (even apart from the jurisprudential principles of justiciability that are embodied in the "case or controversy" limitation), unless a different substantive rule were to be announced only prospectively the law in this area could never change without inflicting a like undeserved wound on some litigant in whose case the new rule was announced.

There is some precedent for the judicial announcement of rules to take effect in the future rather than in the case at bar. But that notion is obviously not one for a district court to adopt — its decisions do not serve as precedents (see, e.g., *Mayo v. Lane*, 1989 U.S. App. LEXIS 694, at 6 (7th Cir.)). Accordingly this Appendix — by definition a dictum, as were our Court of Appeals' discussions in *Jones Dairy* and *Dreis & Krump* — is written in hope that some higher authority may take an appropriate occasion at least to consider the promulgation of a different substantive rule for the reasons articulated here.

APPENDIX C

IN THE MATTER OF THE ARBITRATION BETWEEN FANSTEEL, INC., COMPANY, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE NO. 1777, UNION.	**FMCS No. 87-25922** Subject: Rights of Strikers to Return to "Openings" Under Strike Settlement and Collective Bargaining Agreement

1. The Arbitrator, Aaron S. Wolff, was designated by the parties pursuant to their Agreement and the procedures of the Federal Mediation and Conciliation Service.

2. A hearing was held at the Plant, 1 Tantalum Place, North Chicago, Illinois on April 15, 1988.

Appearances for the Company were:

Eric Hemmendinger, Shawe & Rosenthal, Attorney
Michael J. Mocniak, General Counsel and Assistant Secretary
Robert Nelson, Director, Employee Relations

Appearances for the Union were:

William A. Widmer, III, Carmell, Charone, Widmer and Mathews, Ltd., Attorney
Don Springer, 1986-87 Shop Chairman and Committee Member
Richard Globis, 1987 Negotiating Committee Member

3. A transcript of the hearing was received on April 29, 1988. Post-hearing briefs were received on or about June 13, 1988.

4. Summary of Award: The grievance was sustained.

OPINION AND AWARD OF THE ARBITRATOR

Background Facts

This case presents issues as to substantive arbitrability and the merits of a post-strike grievance concerning the Company's alleged improper upgrading of strike replacements instead of recalling strikers and the alleged improper use of supervisors for bargaining unit work.

The parties, Fansteel, Inc. (the "Company") and the International Association of Machinists and Aerospace Workers, Lodge No. 1777 (the "Union"), have had a collective bargaining relationship for over 30 years (R. 36).[1]

Prior to the expiration of the then current collective bargaining agreement on May 31, 1987,[2] the Company sought a 25% reduction in wages because of a projected annual loss of $2,000,000 (R. 40; CX 4). After lengthy, unsuccessful collective bargaining and notwithstanding advice that the Company intended to operate with replacements,[3] the Union rejected the Company's "final offer" on May 31. A strike began on June 1 and continued until a settlement was reached on Saturday, July 11 (R. 39-40, 98-9).

During the strike, none of the 80 employees in the bargaining unit crossed the picket line to work (R. 40, 101). The Company advertised for replacements and told them it intended to keep them if and when the strike ended (R. 100).

The Company hired about 40[4] replacements, most of whom began work between June 15 and July 12; one of whom began work on June 8 and twelve of whom were hired before

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[1] The transcript of the hearing is cited herein as "R. "; Joint, Company and Union Exhibits as "JX," "CX" and "UX"; and the Company and Union post-hearing briefs as "CB" and "UB," respectively.

[2] Unless otherwise indicated, all dates are in 1987.

[3] If the Company ever hired replacements during a strike, it was not within the last 22 years (R. 175).

[4] One of whom was terminated on September 8.

the strike ended but didn't start work until July 13 or 14 (UX 4-5). About thirty-one of the new hires were assigned to the lowest grade or entry level jobs — Labor Grade ("LG") 8[5], one was assigned to the highest rated job, LG 1 and seven were assigned to ungraded jobs.[6] None of the replacements who were hired had any prior experience in the plant. Several of them, however, had experience in the trades or as inspectors and the one hired as an inspector was assigned to LG 1 (R. 144-5). The Company continued to operate during the strike, but there is nothing in the record as to the level of production maintained. There were several other bargaining units in the Plant represented by several different unions and all were involved in 1987 contract negotiations together (R. 70), but the record does not indicate to what degree, if any, other union employees worked during the strike.

Robert Nelson, Director of Employee Relations, testified that he advised the managers that replacements "with no experience at all" should be hired in LG 8 (R. 101). He added: "We didn't have a contract" and "had to hire them someplace" (R. 101, 150). Personnel Manager Legler, who was part of the team that interviewed the new hires and reviewed their applications, testified that new hires were placed at the entry level LG 8 because, based on their experience and qualifications, that was the only level for which they were qualified.

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[5] The Company's job classification system is structured by department, job function and grade level. LG 8 is considered an entry level position and LG 1 is the highest, most skilled position in a given department. The other grade levels reflect the experience and qualifications of the employees holding a particular job in a particular department. Normally, the upward movement of a LG 8 employee is to an LG 6 or 5. The parties have agreed upon detailed job classification-descriptions for each job in the plant (UX 2). This job classification system is incorporated into the Collective Bargaining Agreement (JX 1, Article 6, ¶N. Article 6, ¶N has been in the Contract at least since 1972 (CX 2).

[6] Two of whom received less and five of whom received more or substantially more than the LG 8 wage rate (UX 4-5).

Where replacements were qualified for higher level jobs, they were so assigned at the time they were hired (R. 173-4). The replacements hired and assigned to the entry level positions at LG 8 were paid at the LG 8 wage rate under the Company's final offer (R. 150).

Mr. Nelson testified that the LG 8 new hires did "the work that the strikers had been doing before the strike" (R. 101). However, he was not involved in operations and did not really have personal knowledge of what work the replacements did (R. 141). While indicating that it had "lots" of witnesses who could testify as to what work the replacements did during the strike (*Id.*), the Company never called any such witnesses. Production Superintendent Hainault did testify as to the nature of the work performed by the four new hires in Department 400. He said that the difference between Grade Level 8 and 6 jobs in Department 400 was that LG 6 operated the forklift and did certain record keeping and that two of the new hires did perform such work before the strike ended and that two who started in just after the strike ended did such work "right off." However, he was not Superintendent of Department 400 until March 1988, about 9 months after the strike was over. While he was at all relevant times superintendent over Departments 402, 406-7, 409, 411, 420 and 425, he never testified as to the nature of the work performed by LG 8 replacements in any of those departments (R. 177-184).

Before the strike ended, the parties had collective bargaining meetings on June 29, July 9 and July 10-11. On June 29 the Company advised the Union that it had 28 or 29 new hires and that they were intended to be permanent replacements (R. 102; CX 5). By July 9 about 39 replacements were hired and 29 were already working. At that time the Company again rejected the Union's request that it not keep replacements after the strike was over. Instead, the Company offered to recall strikers under the "recall procedure to open jobs" (R. 103; CX 6, pp. 3-4).

The last session began on July 10 at about 7:40 p.m. and ended on July 11 at about 5:00 a.m. Throughout this session, the discussions centered on the Union's request, and the Company's refusal, to terminate the replacement workers and the Company's proposed "Strike Settlement Agreement," a draft of which it had brought to the meeting (R. 67-9, 107; CX 7). Mr. Nelson indicated that the Chairman of the Board was still opposed to changing its position on the replacement workers (CX 7).[7]

The Company's proposed Strike Settlement Agreement (the "SSA") contained 15 numbered paragraphs/items. The parties eventually agreed to modify several items in the SSA and to eliminate item 13, and agreed on all items except nos. 2 and 3. Thus, in item 1 they agreed (JX 5):

> "1. The strike against Fansteel Inc. by the Company's employees who are members of one of the Unions is terminated as of the date of this Agreement. Striking employees shall be returned to work to openings in the classifications occupied by the employee on May 31, 1987, in accordance with their respective seniority, and the recall provisions of the Collective Bargaining Agreement(s) shall determine the order of return to work."

Although they did not agree to items 2 and 3, these items remained physically in the SSA and provided (JX 5):

> "2. Jobs filled by employees hired by the Company on or after June 1, 1987 as replacements for striking employees (new hires) shall not be considered vacancies to which returning strikers shall be returned unless and until such jobs are vacated by the strike replacements. Such new hires shall not be bumped or displaced by the return of strikers. Such newly hired employees shall

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[7] A cursory review of the seniority list (UX 4) indicates that while a few strikers had only about five years of seniority, about 50% of them had 10-15 years of seniority and the other half had 20-35 years of seniority while a few had as much as 40 years or more.

become members of the Union(s) as stated in the Collective Bargaining Agreement and their respective seniorities shall be measured from their individual hire date.

"3. A newly-hired employee shall not be 'displaced' or 'bumped' as a result of an employee returning to work after an illness or injury leave of absence (industrial or non-occupational). The returning employees may exercise his/her seniority affecting other employees other than those newly-hired and otherwise in conformance with the Collective Bargaining Agreement(s)."

They did agree to add the following paragraph just below item 3:

"The rights as stated in items 2 and 3, if any, of the persons put to work after the start of the strike will be determined by mutual agreement of the parties, or the NLRB or an agency or a court of competent jurisdiction subject to all rights of appeal and all applicable rules and regulations of the NLRB or such agencies or courts."

To indicate their disagreement on items 2 and 3, the parties agreed to insert the following marginal note along items 2 and 3 (JX 5):

"Items 2 and 3 represent the position of the Company and are not agreed to by the Union or waived by the Company."

In item 15 they agreed (JX 5):

"15. Any dispute arising in the implementation of this Agreement may be referred to the Grievance Procedure of the new Collective Bargaining Agreement or to other appropriate Governmental Agency."

In connection with these strike settlement negotiations, Union Spokesman Globis testified, Mr. Nelson did not indicate that the Company was not agreeable to treating the strikers as though they were laid off and that what Mr. Nelson said was that "we don't know what we are calling them" (R. 82-4).

Asked about the discussion concerning the use of the recall procedure in bringing back the strikers, Mr. Nelson testified (R. 106-7):

> "I was asked specifically why was that [recall procedure] put in there and my response was that even though we didn't think these people were laid off, and I would agree with Mr. Globis, I didn't try to characterize what they were, but we had to have some basis for returning them and we could return them by who was the tallest, who was the fattest, who had the curliest hair or something, but we would have to put something in the agreement in the order of return to work and that's the explanation that was given when the questions were asked to me during the meeting."

Following the signing of the SSA on July 11 and the agreement to the economic terms of a new Collective Bargaining Agreement (the "CBA") which was made retroactive to June 1, the Company began recalling some of the strikers.[8] On July 15 the Company recalled 41 of the 80 employees who had struck (UX 4; R. 76), about 30 of whom returned to work on July 15 (R. 40, 108). As of the arbitration hearing, April 15, 1988, some (the record does not indicate how many) of the strikers had not returned to the plant (R. 54).

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[8] The economic terms accepted were the Company's last offer which included a 21% wage decrease for production workers and a $3.00 hourly decrease for "trades" (JX 4).

On July 15, 1987,[9] the Union filed the instant grievance which alleges (JX 2):

> "The Company is using new hires (probationary) and salary personnel to keep its Union and senior employees from returning to work.
>
> "This is a violation of the current Collective Bargaining Agreement, and in particular, Articles 16-6-10-& 22 as well as the letters on pages 111-112-113-118-and 119.[10]
>
> "We demand that any employees affected by this violation be compensated for all losses suffered."

A third step meeting to discuss the grievance was held on July 21. Mr. Globis testified that he then explained to the Company that it was violating the CBA by using the new hires (who were classified in LG 8) to perform work which LG 8 employees would not be able to perform (R. 53). The Company, through Mr. Nelson, responded that if that was the Union's position: "the Company would consider retroactively moving the people to a higher labor grade" (R. 54). This is what the Company did in its formal answer to the grievance by letter dated July 28 (JX 3):

> "The Company will classify the 'new hires' in the job classifications appropriate for the work the 'new hires' were hired to do and have been performing. This classification will be effective as of the hire date of each of the 'new hires', respectively."

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[9] On July 13, the Union initiated unfair labor practice charges as to alleged discrimination which the NLRB dismissed (CX 1; R. 7, 108).

[10] These Contract references related to the one that had expired, the new one not having been printed yet. The corresponding page references to the new CBA are 80, 81-82 and 87-8 (R. 56-7).

Thereafter, the Company promptly upgraded all of the LG 8 new hires in seven departments to the next higher labor grade in their respective departments which was either LG 6 or LG 5, depending upon the classification they held. These upgrades were all carried out administratively without any job postings or job bidding (R. 71, 134, 172; UX 4, 5).

Company and Union testimony differed as to whether such upgrades were posted for bid prior to 1987 (R. 58-60, 78-81, 111-13, 124-7, 129, 131-2, 141-2, 160-2, 172, 191; CX 2). But there is no dispute that over the years, prior to the strike, LG 8 employees had been upgraded to the next labor grade based on their skills, experience and qualifications on the job and, in the large majority of cases and normal course of events, were so upgraded only after 7 to 9 months of on-the-job experience. While some such upgrades were in a lesser time, the least amount of time before an employee was so upgraded was 2 months and such occurrences were rare (R. 167-8). However, in regard to the LG 8 strike replacement/new hires, the Company upgraded all of them, on or about July 28, without regard to their then qualifications or experience (R. 172).

Richard Globis, the Union's Chief Negotiator and author of the present grievance, was not recalled to the plant in Department 400 until December 1987. Part of the bargaining unit work in Department 400 was to prepare receiving reports ("Receivers") as to goods or material coming into the plant. In order to prepare a Receiver, it is necessary to get the material on a fork lift, open the containers, evaluate the material and then input data regarding it into a computer terminal. The computer printouts indicate the initials of the employee who prepares the Receivers. Mr. Globis testified that he examined the available Receivers in Department 400 and noted that during the period from July 11 through December 1987 there were 30 instances, spread out over each month, in which Foreman Ted Madura processed Receivers for various material including acids, steel, files, paper, etc.

His review was based only on the Receivers that were still in his department and there were others to which he did not have access. He also stated, however, that in the shipping area he saw a "big stack" of receiving reports and in the few minutes that he had to review them, he could not find any that were prepared by the new hires. Instead, he found that "all" or "the more difficult" Receivers, were made out by Foreman Madura. Mr. Globis also indicated, however, that while he saw Foreman Madura's name on more complicated Receivers, he did see initials of both supervisors and new hires on routine, "run of the mill" Receivers. It could take 2 minutes or longer to enter a Receiver into the computer. In the past, Mr. Globis testified, the work of preparing Receivers has always been done exclusively by bargaining unit employees except as follows: once when Foreman Madura asked him recently if he could do a Receiver because he knew the background on it better than Globis. Also, Supervisor Brad Jones, in another area and with another computer, has prepared 3 kinds of Receivers for 20 years (R. 61-4, 85-6, 89-91).

Apart from Department 400, the Union offered no direct evidence as to foremen allegedly performing bargaining unit work.

Relevant or Cited Contract Terms

In addition to the provisions of the SSA, the pertinent provisions of which have been set forth above, the current CBA provides (JX 1):

ARTICLE 6

Wage Rates and Classification

(N) The Company and the Union agree that all job classification sheets which have been agreed to as of the date of this Agreement shall not be changed unless such changes are made by agreement between the Company and the Union, or are made because of technological changes as hereinafter

defined. The Company and the Union also agree that while the Company has the right to recognize its divisions and its departments as it sees fit, it will not do so where the effect thereof would be to change any of the seniority rights of employees represented by the Union, unless the same is done by mutual agreement or unless it affords the affected employees such seniority rights as may be reasonable and feasible under the circumstances.

The parties recognize that the Union is concerned with the seniority rights of the employees with respect to such matters as layoff, overtime, shift preference and vacation preference, as well as with the wages of the employees. The Company accepts these principles; and these rights shall be protected when reorganizations of divisions or departments, or jobs, may be instituted.

The Company and the Union shall institute a Committee composed of three members selected by each party, which said committee shall meet on a regular basis and which committee shall be furnished by the Company with all information necessary regarding planned changes, so that it may consider in each case whether or not the Company in connection with said change has afforded to the affected employees protection with regard to their rights under the circumstances involved in the particular proposed change.

Where a job is changed or a new job created as a result of matters contained in this Section (N), the Company shall furnish a job evaluation sheet to the Union covering the new or changed job. The Union shall have the right to protest the job evaluation sheet within a reasonable time, and if it does so, the rate change resulting, if any, from such protest, shall be paid retroactive to the date the job was changed.

The Committee referred to in this Article 6, Section (N), designed by the Union and by the Company, shall have the authority to make agreements binding upon both the Company and the Union relating to any of the matters referred to

in this Article 6, Section (N). If the Committee shall fail to agree upon any matter, either party may refer the matter to the regular Grievance Procedure.

ARTICLE 10

Seniority

F. Reduction in Force, Layoff and Recall from Layoff

1. In the exercise of seniority privileges in connection with an increase or decrease in the number of employees from time to time employed by the Company, the members of the Union shall be treated as a separate unit. They shall have seniority only within the Union and may exercise seniority privileges only in relation to other employees who are at the time members of the Union. No employee may exercise seniority privileges against any employee who is a member of another Union, regardless of the relative length of continuous service of such employee.

2. Whenever it becomes necessary to reduce the number of production employees, such reduction shall be by seniority within each job classification in which the reduction in force is to be effected. An employee who has completed his probationary period of sixty (60) days and who has less than twelve (12) months' seniority shall be sent to the Personnel Department for transfer as follows:

(A) A choice of open plant seniority jobs or jobs held by probationary employees with plant seniority.

(B) In the event the employee cannot be placed in a job as listed in (A), he will be allowed to replace the individual who has the least plant seniority who occupies a classification on which the experience factor is in the first degree.

Such employees shall be paid in accordance with the provisions of the transfer clause.

If an employee about to be laid off who has less than twelve (12) months' seniority cannot be place in a job as listed above, he shall be placed in a layoff status.

3. Whenever it becomes necessary to reduce the number of plant employees who have more than twelve (12) months but less than twenty-four (24) months' seniority, such reduction shall be by seniority within each job classification in which the reduction is to be effected. An employee shall be sent to the Personnel Department for transfer as follows:

(A) A choice of open plant seniority or jobs held by probationary employees with plant seniority.

(B) In the event the employee cannot be place in a job as listed in (A), he will be allowed to replace the individual who has the least plant seniority who occupies a classification on which the experience factor is either first or second degree.

If an employee about to be laid off who has twelve (12) months but less than twenty-four (24) months' seniority cannot be placed in a job as listed above, he shall be placed on layoff status.

4. Whenever it becomes necessary to reduce the number of plant seniority employees who have twenty-four (24) months or more seniority, such reduction shall be by seniority within each job classification in which the reduction is to be effected. An employee shall be sent to the Personnel Department for transfer as follows:

(A) A choice of open plant seniority jobs, a choice of jobs held by probationary employees with plant seniority and a choice of any job held by an employee who has less than twenty-four (24) months' plant seniority occupying a classification on which the experience factor is either first or second degree and on which the physical demand, i.e., the handling of heavy weight, is such that the employee could reasonably be expected to perform the work. However, in the event an employee with more than

twenty-four (24) months' seniority but less than five (5) years' seniority cannot be place in a job listed in this Section (A) due to the fact that no employee with less than twenty-four (24) months of seniority is occupying a first or second degree classification or due to the fact that the physical demand, i.e., the handling of heavy weight is such that the employee could not reasonably be expected to be able to perform the work, then such employee shall be allowed the choice of any job held by an employee who has less than five (5) years' seniority occupying a classification on which the experience factor is either first or second degree and on which the physical demand, i.e., the handling of heavy weight, is such that the employee could reasonably be expected to perform the work.

(B) In the event an employee with ten (10) or more years of seniority cannot be place in a job as listed in (A) due to the fact that no employee with less than five (5) years of seniority is occupying a first or second degree classification or due to the fact that the physical demand, i.e., the handling of heavy weight, is such that the employee could not reasonably be expected to be able to perform the work, then such employee shall be allowed the choice of any job held by an employee who has less than ten (10) years' seniority occupying a classification on which the experience factor is either first or second degree.

Such employees shall be paid in accordance with the provisions of the transfer clause.

If the seniority of the employee affected would not entitle him to displace an employee as set forth above, the employee shall be laid off.

5. In the event an employee, who has completed his probationary period occupying a job with either a fourth or fifth degree experience factor is to be laid off, the regular layoff procedure as to rights of such laid off employee will not apply

at the election of such employee, in which case the following procedure will be invoked:

The employee will be sent to the Personnel Department, he will be permitted to displace that employee with the least plant seniority who occupies a related job as to which the experience factor is a third degree, and if such laid off employee has two (2) or more years' seniority, he will be permitted to displace any employee with less than two (2) years' seniority who occupies a related job such as to which the experience factor is a third degree; and such an employee with ten (10) or more years of seniority shall if he is unable to take a classification on which the experience factor is the third degree by virtue of any of the provisions of this ARTICLE 10 shall be permitted to displace the least senior employee with less than ten (10) years' seniority who occupies a classification on which the experience factor is the third degree. The employee so displaced will revert to the processes of the normal layoff procedure as outlined in ARTICLE 10, Paragraph F, hereof.

6. Any employee released from his classification due to lack of work may be allowed to displace a less senior plant seniority employee within his department, provided he has satisfactorily performed the duties of that employee's position for at least a period of one-half (1/2) the minimum experience factor time, as indicated on the present job classification, or for a period of sixty (60) days, whichever is the lesser.

7. Whenever a plant seniority employee is about to be laid off as a result of a reduction in force, he shall have, if he so chooses, in lieu of the rights conferred by the preceding subsections of this ARTICLE 10(F), the following rights:

(A) If the employee has less than twenty-four (24) any job which his seniority permits him to take which he has previously satisfactorily performed for sixty (60) days or more, or any job which is substantially the same in terms

of job duties as one which he has previously satisfactorily performed for sixty (60) days or more.

(B) If the employee has twenty-four (24) months' plant seniority or more, he may take any job which his seniority permits him to take which (i) he has previously satisfactorily performed for a period of sixty (60) days or more, or (ii) is substantially the same in terms of job duties as a job which he has previously satisfactorily performed for a period of sixty (60) days or more, or he may take any job which is sufficiently related, in terms of the job duties required, to either his job or a job which he has previously satisfactorily performed for at least sixty (60) days, that he can reasonably be expected to successfully perform that job.

8. When it becomes necessary to recall employees from layoff status, those employees who were laid off last from a particular job classification shall be recalled first in line with their seniority.

If as a result of a layoff an employee has accepted another job with the Company by reason of lack of work transfer, he shall be recalled to his former job just as though he were in layoff status, provided, however, if such employee is on a job of equal or higher pay than the job on which he has recall rights, his right to recall shall expire one less than one (1) year; or, if the employee has seniority of one (1) year following the effective date of layoff from said job if the employee has seniority of one (1) year or more, his right to recall shall expire when the period following the effective date of layoff from said job equals the amount of the employee's seniority and in any event shall expire five (5) years following the effective date of layoff from said job.

In the event that an employee's job reopens and he is at the time occupying another job with the Company, he shall, within ten (10) working days, either be permitted to return to the job on which he has seniority rights, or shall be paid the

rate he enjoyed on the job from which he was originally laid off.

Employees called back to work after a layoff shall be notified by certified mail addressed to the last known address of such employee as it appears in the records of the Company, and such notice shall be mailed or sent at least seven (7) working days prior to the time scheduled for the employee to return to work. A true copy of this notification of recall shall also be sent to the Shop Chairman of the Union involved. If an employee in a layoff status shall accept other employment or leaves the area temporarily and shall file a written request with the Company for ten (10) working days' notice of recall, such employee shall be left on the recall list but shall be passed over until the Company can give him ten (10) working days' notice of recall for a particular job without affecting the efficient operations of its plants. In all other cases, only seven (7) working days' notice is required.

9. An employee transferred to a job due to lack of work who does not satisfactorily perform the duties of said job shall be laid off and sent home. Thereafter, he shall be called to the next available open job to which he is qualified and in accordance with his seniority, provided he has agreed to said recall. If said employee does not satisfactorily perform the duties of the latter job, he shall again be laid off and sent home. Neither the Company nor the Union shall have any further responsibility as to recall of any such employee, except recall to his seniority job when it again becomes available.

10. Notwithstanding the provisions of this Section F to the contrary, any qualified employee accepting any job in Department 402 shall not be recalled to his former job from which he was laid off, unless the recall is to a job in a higher labor grade than his present job or he is released by the Company because he does not satisfactorily perform the duties of his new job. In such cases he shall retain his recall right to his former job as if afforded in accordance with the balance of this Agreement.

ARTICLE 11

Transfers as the Result of a Layoff and Upgrading

B. Upgrading

1. Employees employed in a lower labor grade who have the proper qualifications for a vacancy in a higher labor grade will be upgraded by transfer to such vacancy whenever practicable. The determination of the qualification of any employee to fill such vacancies shall be made by the management but may, if the Union chooses to do so, be made the subject of a grievance under the terms of this Agreement. The management shall give preference to that employee with the most seniority (when training, skill and ability are approximately equal). This paragraph shall not apply to promotions to supervisory jobs. The Company shall keep the Shop Chairman regularly advised as to open jobs and new jobs.

2. Where such transfer is from one labor grade to a related job in a higher labor grade the employee shall receive a ten (10) cent per hour increase effective at the time of the transfer. The employee may, in special circumstances be given a greater increase than ten (10) cents per hour, if, in the judgment of the Company, the employee's qualifications for the new job justify it.

3. Where such transfer is from one labor grade to an unrelated job in a higher labor grade, the employee shall continue to receive the same rate as he was receiving at the time of the transfer, or shall be increased to the base experience rate, whichever is higher. The employee shall be eligible to be advanced within the labor grade in accordance with Article 6, Paragraph (I).

4. Where such a transfer is from one labor grade to an unrelated job in the same labor grade and the transfer is made at the request of the Company, the employee will suffer no reduction in pay. This provision does not apply in similar transfers that come as a result of a layoff.

Where such a transfer is from one labor grade to an unrelated job in the same or lower labor grade and the transfer is made at the request of the employee, the employee will receive the transfer rate or he shall receive his present rate, whichever is lower.

Where such a transfer is from one labor grade to an unrelated job in the same labor grade and the transfer is made at the request of the employee, the employee will receive that rate which two-thirds of the difference between the base experience rate and the top rate, or he shall receive his present rate, whichever is the lower.

5. Any employee who is transferred under the provisions of this Section of the contract who does not satisfactorily perform the duties of the new job within sixty (60) days will be returned to his former job at the rate of pay he was receiving before the transfer.

6. (a) Except as hereinafter provided, any job in a department which becomes "open" (whether by reason of addition to force, death, retirement, discharge or any other reason) shall be listed on the departmental bulletin board, for a period of thirty-two (32) hours. Employees in that department may affix their signature below the job listing. The most senior qualified employee in that department who so lists his name within the thirty-two (32) hour period shall be entitled to transfer to that job if such transfer would constitute an upgrade as defined by reference to the provisions of this ARTICLE 11, B.6.

(b) The Company may, at its option, in the event it determines that it is not likely that the job can be filled from within the department, simultaneously post the "open" job on the plant posting board. In all cases where the job is not, in fact, filled from within the department, the Company shall post such job on the plant posting board for a period of forty-eight (48) hours. Employees may affix their signatures below the job listing whenever a job is so posted on the plant posting

board. The most senior qualified employee, provided he has at least five (5) years of seniority, who so lists his name within the forety-eight (48) hour period, shall be entitled to transfer to that job if such transfer would constitute an upgrade as defined by reference to ARTICLE 11, B.6. of this Collective Bargaining Agreement.

(c) In the event that such an "open" job is not filled either (1) from within the department, or (2) from within the plant by a qualified employee with five (5) or more years of seniority, the Company shall offer transfer to the most senior employee who either (1) has signed his name to such job listing(s), or (2) has an active request for transfer on Form 1195 in the Personnel Department of the Company which has been on file less than one (1) year as of the end of the forty-eight (48) hour posting period. For purposes of this subparagraph (c), an employee with more than five (5) years seniority need not be upgraded in order for his request for transfer on Form 1195 or his signature on the posting to result in his receiving such an "open" job. For purposes of this subpargraph, the term "qualified" shall be defined by reference to the provisions of this ARTICLE 11.B.

(d) For the purposes of ARTICLE 11, Section B.6. only, an upgrade is defined as:

(1) A transfer from a job in one labor grade to a job in a higher labor grade, or

(2) A transfer from a job in one labor grade to a job in the same or lower labor grade when the transfer to the same or lower grade job is based on the reasonable probability that, as a result of such transfer, the employee would be more likely to be upgraded to a higher labor grade than that of his present job.

(e) Any employee receiving a transfer as the result of this subparagraph 6 shall not have a right to again bid for a job or receive a transfer hereunder for a period of one (1) calendar year following his said transfer. However, any employee may

bid for an "open" job in his department at any time following his transfer as a result of this subparagraph if said "open" job is directly related to the work he is performing and is an upgrade within the job family of his present job.

A Form 1195 submitted by an employee who subsequently refuses transfer to a job offered because of his Form 1195 being on file shall invalidate that Form 1195.

(f) Whenever any "open" job is posted and thereafter filled, no "open" job occurring as a result of filling the first "open" job shall be posted and the provisions of this subparagraph 6 shall not apply with respect to such job.

(g) No employee may bid for an "open" job until he has been an employee of the Company for at least ninety (90) calendar days. The denial of an employee's request for interdepartmental transfer as a result of this ARTICLE 11 Section B, made by an employee, hired after June 1, 1978, who has less than one (1) year of seniority and is working on labor grade seven (7) or higher, job will not be the subject of a grievance.

ARTICLE 13

Adjustment of Grievances

Should any employee feel aggrieved by any matter arising out of his employment by the Company, or should any differences arise between the Company and the Union

(a) as to the meaning and application of any of the provisions of this Agreement, or

(b) respecting any other matter relating to rates of pay, wages, hours or other conditions of employment affecting the employees of the Company

an earnest effort shall be made by all of the parties to settle such grievances or differences promptly by means of the following procedure, and there shall, under no circumstances, be

any suspension of work on account of such grievances or differences.

ARTICLE 16

Management

The management of their plants and the direction of all their employees, including the hiring, promotion, suspension and discharge of those employees, shall be vested exclusively in the Company; provided, however, that such power shall not be used for the purpose of discrimination against any member of the Union or contrary to the provisions of this Agreement.

ARTICLE 22

Changes in Contract

No material changes in the provisions of this contract whether by addition thereto, subtraction therefrom, or variation therein, shall be made unless they are reduced to writing and signed by the Company and the Shop Committee and the Business Agent of the Union.

June 1, 1975

Lodge 1777
International Association of Machinists and Aerospace Workers
Fansteel Inc.
North Chicago, IL 60064

Gentlemen:

It has for many years been the firmly established labor relations policy of this Company to give fair and full consideration to the welfare of all our employees, including those represented by Unions, in the making of all decisions which might affect them. This letter is intended to assure you that these well-established policies will not be changed during the term of the Collective Bargaining Agreement.

Very truly yours,
FANSTEEL INC.
Director, Industrial Relations
E.R. Clarke

June 1, 1975

Lodge 1777
International Association of Machinists and Aerospace Workers
Fansteel Inc.
North Chicago, IL 60064

Gentlemen:

This will confirm our understanding and agreement with reference to Foremen, Assistant Foreman or Salaried Personnel working.

A Foreman, Assistant Foreman or Salaried Employee will be permitted to perform work which is regularly performed by members of your Union ONLY for the purposes of—

(a) Instruction.

(b) Taking emergency action necessary to protect personnel and property.

(c) Diagnosing trouble. This will be done in the presence of the employee operating the machinery or equipment unless exceptional circumstances exist which make this infeasible. When such diagnosis has been made, the hourly employee will perform the work.

(d) Producing first pieces. This operation, when performed by the foreman, will be performed in the presence of the employee assigned to the machine on which the parts are being produced.

(e) Experimentation, where such work is not regularly performed by Production or Maintenance Employee. Prior to the experimentation, the foreman or salaried employee about to undertake the experimental work will advise the department steward of the work to be performed. For the purpose of this agreement, experimental work shall be deemed to include equipment,

processes and products which are normally developed, fabricated or constructed by Salaried Personnel of the Engineering and Laboratory Departments. When such experimental work has progressed to the point where it is released for regular production, it will no longer be considered experimental in character.

It is not the intention of Management that any Foreman, Assistant Foreman or Salaried Employee perform the work normally performed by our Production and Maintenance Personnel except in those instances outlined above.

No Company or Union personnel shall seek to evade the policy set forth in this letter, it being our intention that the spirit as well as the letter hereof shall be observed.

Very truly yours,
FANSTEEL INC.
Director, Industrial Relations
E.R. Clarke

June 1, 1975

Lodge 1777
International Association of Machinists and Aerospace Workers
Fansteel Inc.
North Chicago, IL 60064

Gentlemen:

We should like to confirm certain practices regarding temporary transfers of employees under Article 6 (d) of the Collective Bargaining Agreement.

We will continue the long established practice regarding rates of pay applicable for employees who are temporarily transferred. If the temporary transfer is to a job in a higher labor grade job the temporarily transferred employee will receive the top rate of the job to which he is temporarily transferred; if the temporary transfer is to a job in a lower labor grade the employee will keep the rate of pay he had before the transfer; if the transfer is to a job in the same labor grade the employee will receive the rate of pay which he was receiving before the temporary transfer.

We would also like to confirm that when temporary transfers take place it is the employee who is being transferred, not the job, and such transfer does not constitute any change in the scope of job duties of the job from which he was transferred, nor does such temporary transfer result in any change in the scope of the job duties of the job to which he is temporarily transferred. Any changes in jobs or job duties are to be accomplished through the other applicable provisions of the contract, such as the regular job evaluation procedure, and Article 6(n), if applicable.

No employee shall hereafter be entitled to claim any special rights to a job or the work he performs while temporarily transferred solely because of such temporary transfer, unless such rights are specifically granted by the Collective Bargaining Agreement.

Very truly yours,
FANSTEEL INC.
Director, Industrail Relations
E.R. Clarke

Discussion

The Issues and Arbitrability

Although the parties did not agree on the precise formulation of the issue(s) in this case, the Company contends, as it did at the arbitration hearing, that this case "is not arbitrable since there was no agreement to submit the issue in dispute to arbitration" (CB 16-20). The Union finds this contention to be a "red herring" and also argues that by not challenging arbitrability in court, the Company "voluntarily submitted itself to the jurisdiction of the Arbitrator" (UB 12).

While it is no doubt true that courts may have the final word on substantive arbitrability,[11] a party may raise this issue before an arbitrator without waiving its right to court review of that issue at least where, as here (R. 5-6), the party stakes out its position or objection at the outset of the arbitration hearing. See F. & E. Elkouri, *How Arbitration Works*, (4th Ed. 1985), pp. 216-17, 221; *Jones Dairy Farm v. Local P. 1236*, 760 F.2d 173 (7th Cir. 1985); *Local 710, Bakery Workers v. National Biscuit Co.*, 378 F.2d 918 (3rd Cir. 1967). The manner in which the Company proceeded simultaneously on the arbitrability issue and merits is also the most practical, economic method and in tune with the collective bargaining/arbitration process and sound labor management relationships. Accordingly, the Union's claim of "waiver" is without merit.

The Company's position on arbitrability was stated succinctly at the hearing (R. 5-6):

> "To the extent that this grievance arises concerning the implementation of the strike settlement agreement, it is clearly arbitrable. However, to the extent

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[11] *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 89 L.Ed. 2d 648 (1986).

that the union is seeking in this grievance the reinstatement of strikers who were replaced by permanent replacements during the strike, such relief is clearly not authorized by the collective bargaining agreement or strike settlement agreement which expressly recites the parties failure to reach agreement on reinstatement and which expressly provides for a forum to decide that dispute, which would be the National Labor Relations Board and not arbitration.

"Therefore, any award of the relief that the union appears to be seeking in this case would be beyond the scope of the collective bargaining agreement and would not be legal and to that extent we believe that what the union is seeking is not authorized by the collective bargaining agreement.

"We are willing to let the arbitrator make that determination in the first instance. However, we want to make it clear that we are in no way submitting to the arbitrator the question of the lawfulness of the union's [sic] hiring permanent replacements, which is an issue for the National Labor Relations Board."

This argument is refined in its brief as follows (CB 17-20):

"This arbitration is a continuation of the parties collective bargaining dispute concerning the respective rights of strikers and replacements. This point is emphasized by the fact that the remedy sought by the Union in this case, displacement of the strikers, was rejected by the Company in negotiations, as memorialized in Item 2 of the Strike Settlement Agreement:

'Such new hires shall not be bumped or displaced by the return of strikers.'

"Recognizing their differences, the parties agreed in negotiations that the relative rights of strikers and

replacements, which is exactly what this case concerns, would have to be resolved through legal channels. Thus, the second paragraph of Item 3 of the Strike Settlement Agreement provides:

'The rights as stated in items 2 and 3, if any, of the persons put to work after the start of the strike will be determined by mutual agreement of the parties, or the NRLB or an agency or a court of competent jurisdiction, subject to all rights of appeal and all applicable rules and regulations of the NLRB or such agencies or courts.'

"However, the parties did not agree that this issue would be resolved by arbitration. Accordingly, the second paragraph of Item 3 (quoted above) conspicuously omits to mention arbitration as a forum.

"Item 15 of the Strike Settlement Agreement, which provides that disputes over the implementation of the Strike Settlement Agreement may be referred to the grievance procedure, does not make this case arbitrable. The scope of any arbitrator's authority is limited by the parties' agreement. *AT&T Technologies v. CWA*, 475 U.S. 643, 121 LRRM 3331 (1986). In this case, there was a meeting of the minds concerning many aspects of the return to work, such as order of return, seniority dates, insurance, and vacations. An agreement was reached on these subjects, and was made enforceable through arbitration. However, the Strike Settlement Agreement also reflects an express disagreement on the subject of this case. Although the NLRB and courts can resolve issues on which the parties failed to agree by reference to federal labor law, an arbitrator's authority is limited to enforcing contractual agreements. Where, as in this case, there was an express failure to reach an agreement concerning the subject matter of the dispute, there is no agreement for an

arbitrator to enforce. *See Local 5-176 v. Elberta Crate & Box Co.*, 117 LRRM 2560 (M.D. Ga. 1984) (in absence of agreement, grievance over retention of strike replacements is not arbitrable); *Bio-Science Laboratories*, 209 NLRB at 795, n. 3 (whether strikers have rights of laid-off employees is question of law, not contract, in absence of agreement on point).

"This is not an appropriate case for the arbitrator to exercise a 'gap filling' function, by interpreting the term 'opening,' as used in Item 1 of the Strike Settlement Agreement. While it is sometimes appropriate for arbitrators to flesh out agreements by interpreting their terms, *see* Elkouri & Elkouri, *How Arbitration Works*, p. 345 (4th Ed. 1985), such a function is not appropriate where 'filling such "gaps" would constitute contract-making rather than contract construction or contract application.' *Labor Standards Association*, 50 LA 1009, 1010 (1968). In this case, the parties expressly recognized the existence of a 'gap' in their agreement, and reserved its resolution for the NLRB or courts, not arbitration. Thus, the agreement to arbitrate in Item 15 does not and cannot include the issue in this case."

In order to resolve this case, including the question of substantive arbitrability, it is essential to find first what the real issues are under this grievance which itself has changed during its processing. The grievance is somewhat broad and vague and the Company handled it promptly "to find out what the Union had in mind" (R. 111). The grievance does not specifically mention the SSA. Nor does it appear that it or any provision of the CBA was mentioned at the third step grievance meeting on July 21. The grievance charges specific violations only of the CBA: Article 16 - Management; Article 6 - Wage Rates and Classification; Article 10 - Seniority;

Article 22 - Changes in Contract and three letters of agreement concerning (1) no changes in "well-established policies," (2) supervisors not performing bargaining unit work and (3) practices as to temporary transfers under Article 6(d).[12]

From the testimony concerning the third step grievance meeting it appears that the Union complained that under the CBA the work to be performed *after* the strike could not be done by the new hires who were only LG 8s (R. 53, 78). Complaint was also voiced as to foremen doing bargaining unit work (R. 109). The Company's response was that if the new hires were not properly classified after the new CBA became effective, it would correct that by reclassifying them retroactively to their date of hire (R. 53-4, 109-10). A week later the Company administratively upgraded the LG 8's one level to LG 6 or 5. The Union then asserted that the upgrading itself violated various practices under and provisions of the CBA and the strikers' right to be recalled under the CBA and the SSA.

It is commonly held that claims, defenses, issues and facts not raised during the grievance procedure may not be raised for the first time in arbitration. But that rule does not apply here for several reasons. First, it may fairly be said that the Company caused an expansion of the grievance by the action it took in answering it. While that response might have generated a second formal grievance, there was no need to do so since the Union's reply was a logical extension of and fairly within the statement of claim that the Company was still "using new hires . . . to keep its Union and senior members from returning to work" (JX 2). Moreover, the Company has never contended that it was surprised or that the Union's

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[12] It could fairly be argued, however, that implicit in the statement of the grievance (JX 2, *supra*, p. 7), is that the Company was also violating the SSA by using new hires to keep Union and senior employees from returning to work.

position in arbitration goes beyond that asserted during earlier steps of the grievance procedure. Therefore, the Company waived any such potential argument. Its post-hearing brief, instead, meets directly the issues raised by the Union as to whether its actions violated the SSA and the CBA.

Accordingly, the Arbitrator finds that the issues raised by the grievance and submitted to arbitration are as follows:

1) Did the Company violate the CBA in the manner in which it used the new hires after the strike was over and before it reclassified them?

2) Did the Company violate the CBA or the SSA in the manner in which it reclassified and upgraded the new hires on or about July 28?

3) Did the Company, after the strike was over and the CBA was in effect, use foremen to perform bargaining unit work in violation of the CBA?

4) If the Company did violate provisions of the CBA or the SSA, what remedies are appropriate under the circumstances?

The grievance clause of the CBA is very broad. Article 13 provides (JX 1, p. 43):

> Should any employee feel aggrieved by any matter arising out of his employment by the Company, or should any differences arise between the Company and the Union
>
> (a) as to the meaning and application of any of the provisions of this Agreement, or
>
> (b) respecting any other matter relating to rates of pay, wages, hours or other conditions of employment affecting the employees of the Company

Item 15 of the SSA is also broad (JX 5, p. 3):

> "15. Any dispute arising in the implementation of this Agreement may be referred to the Grievance Procedure of the new Collective Bargaining Agreement or to other appropriate Governmental Agency."

Whether or not the Union is correct in its interpretation of the various provisions of the CBA and SSA on which it relies, the disputes or issues raised here plainly fall within the scope of "differences" or disputes under Article 13 of the CBA and Item 15 of the SSA and are, therefore, arbitrable.[13]

In holding that the issues raised here are arbitrable, it should be clear that the Arbitrator is not deciding the rights of the replacements. Regardless of the findings made or relief awarded here as to the strikers under the SSA and the CBA, the Company is free to retain, layoff or terminate replacements as it deems appropriate. The rights of the replacements are not before the Arbitrator. Item 3, second paragraph of the SSA (*supra*, p. 6) makes clear that the rights, if any, of those hired during the strike are to be determined by the NLRB or the courts or mutual agreement of the parties, not by arbitration.[14] Nothing in this Award should be construed as passing upon the rights of the replacements.

Accordingly, we turn to the merits of this case.

The Merits

1. Did the Company violate the CBA in the manner in which it assigned work to the new hire LG 8s between July 13 and July 28?

The main, initial thrust of this grievance was that, after the strike ended and the new CBA became effective, the replacements, most of whom had been assigned to the lowest entry level jobs, could not perform work normally assigned to higher rated employees. The Company never disputed this contention. Instead, at the third step grievance meeting on

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[13] See also, *Yarway Corp.*, 85-1 ARB ¶8058 (CB 29).

[14] The Company's argument that the second paragraph of item 3 removed from arbitration the "relative rights of strikers and replacements" (CB 18), is overbroad and incorrect. That paragraph reserved to the NLRB or the courts only the rights "of the persons put to work after the start of the strike"—i.e., the replacements. Rights of the strikers, if any, under specific provisions of the SSA and the CBA are expressly made subject to the grievance and arbitration procedures.

July 21, it told the Union it would remedy the matter by reclassifying and upgrading the new hires. This is precisely what it did on or shortly after July 28 when all LG 8 new hires were upgraded "retroactively"[15] to the next level in their classification, LG 6 or LG 5.

The Company would justify its action by raising a defense of "practical realties" and "administrative" necessity (CB 24). Thus, it further says (CB 24-5):

> "Obviously, not all the administrative aspects of settling a strike, bringing back strikers and increasing production can be attended to instantaneously. [Citing *Kroger Co.*, 25 LA 841 (1956); and *Titanium Metals Corp.*, 70-1 ARB ¶8263 (1969).]
>
> "Making reasonable allowances, there was no delay between the strike settlement and the classification. To the contrary, the Company brought the Collective Bargaining Agreement to bear on the new hires as fast as reasonably possible considering (a) that a strike had just ended and there were many other things demanding attention, and (b) that the Union filed a grievance concerning the classification of the replacements on its first day back to work. * * * "

The Arbitrator, on this record, is not persuaded. The Company placed the new hires in LG 8 before the strike ended essentially because their lack of skills, experience and training suggested, if not required, that they be so classified. If the grievance had not been filed there is nothing in the record to suggest the Company intended to upgrade them when, or soon after, the strike ended. On meeting with the Union and learning the thrust of the grievance, the Company never suggested that it had intended to upgrade the replacements after the dust settled. Rather, it felt forced to do so because the

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[15] In this respect it may be noted that there is no evidence that the Company *paid* the higher rate retroactively to July 13 or to date of hire.

Union confronted it with out-of-classification Contract violations.[16]

The cases cited do not support a different conclusion here. In *Kroger*, 25 LA 841, *supra*, the Company had been completely shut down and not operated by strike replacements or anyone else. It involved a complete start-up and recall of *all* employees. Also, the delay there which caused some employees to lose the disputed one day's holiday pay was the result of the posting of a picket line by a different union. In *Titanium*, 70-1 ARB, ¶8263, *supra*, the Company likewise had been shut down completely for 3½ months and did not operate with replacements. There was no strike settlement agreement. In both *Kroger* and *Titanium* there was substantial, specific evidence as to start-up problems and difficulties. Here, there is no such evidence.

Under the circumstances, and considering also that the Company's post-strike wholesale administrative upgrading was not, as indicated below, justified, the Arbitrator cannot find that the out-of-classification Contract violations, which the Company implicitly admitted continued for about two weeks, may be overlooked on the ground of administrative necessity, realism or practicality.

2. Did the Company violate the CBA or the SSA in the manner in which it reclassified and upgraded the new hires on or about July 28?

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[16] Since the Company apparently never before, or at least in 22 years, used replacements during a strike, it is understandable that it did not realize it might be placing itself untenable position.

The Union contends that the post-strike reclassifications-upgradings were improper in two respects. First, it asserts that the upgradings were to "open positions" which required the Company to post them and follow the bidding procedures under Article 11 of the CBA. Failure to do so denied strikers' rights to recall under the CBA and SSA. Second, the reclassifications violated the past practice of not upgrading an employee from a lower classification when there are employees on layoff with recall rights to the higher position. Further, the Union holds that an "internal" Company memo regarding administrative upgradings dated December 11, 1984 (CX 2) is not binding or applicable here (UB 18-21).

The Company argues as follows: First, the post-strike classifications of replacements "did not result in 'openings' but were instead the initial assignments of the new hires under the [CBA]," citing *NLRB v. American Olean Tile Co.*, 826 F.2d 1496 (6th Cir. 1987). It considers the strike settlement, return to work, grievance and answer and the change in labor grades as being "all part of one overall process of resolving the strike and resuming operations under the CBA" (CB 25).

Second, even if the post-strike classifications were "upgrades" within the meaning of the CBA and not merely "initial assignments," there still were no "openings" to which strikers could be recalled. There is nothing in the CBA or SSA that constitutes an upgrading "without a change in function" as an "opening" (CB 26-7). Further, the company says there is a "principle . . . that a vacancy will not be found if permitting a striker to claim a vacancy would result in displacement of a replacement" (CB 27-8).[17]

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[17] It cites *MCC Pacific Valves*, 244 NLRB 931 (1971); *Lodges 143 and 1746, IAM v. United Aircraft*, 534 F.2nd 422, 442 (2nd Cir. 1975); *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982); and *Gallatin Homes*, 81 LA 1279 (1983).

Finally, the Company finds nothing in the CBA or past practice to support the Union's argument that "employees could not be upgraded while more senior employees were on layoff" (CB 28). It cites numerous authorities for the proposition that striking employees are not deemed "laid off" employees (CB 29-30);[18] and concludes (CB 30):

> "In this case, there is no agreement to treat strikers as having lay-off status. Rather, the agreement, like the agreement discussed in *Fairfield Aluminum, supra*, provided only that recall provisions would furnish the order in which strikers would be returned to work. Accordingly, the grievance cannot be sustained based on layoff and recall or seniority provisions of the Collective Bargaining Agreement."

Initially, I cannot accept the employer's contention that the post-strike "classification" of the replacements was not a *re*classification but rather only an "initial assignment." The Company consciously assigned replacements to LG 8, where they belonged, at the time they were hired. Further, *if* the mass upgrading was an initial assignment then the replacements still should have been classified at entry level LG 8 because Company testimony shows conclusively that the new hires belonged there based on their lack of experience and qualifications. When hiring replacements "with no experience at all" they were to be hired in LG 8 (R. 101, 174). It was undisputed that in the normal course of events it would take an entry level employee from 7 to 9 months of experience on the job to become proficient enough to be upgraded to the next level of LG 6 or 5. In the past it never took less than 2 months and such an occurrence was rare. It is undisputed that

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[18] *Fairfield Aluminum Castings Co.*, 67 LA 613 (1976); *Livers Bronze Co.*, 89 LA 238 (1987); *Meridian Woodworking Co.*, 87 LA 645 (1986); *Yarway Corporation*, 85-1 ARB ¶8058 (1984); *Revco Industries, Inc.*, 73 LA 833 (1979); *Yoder Brothers, Inc.*, 62 LA 476 (1974); *E.J. Lavino & Co.*, 43 LA 213 (1964); and *Bio-Science Laboratories*, 209 NLRB 796 (1974).

when the Company classified or reclassified the replacements on or about July 28, it gave no consideration to their qualifications as of July 28, even though approximately 12 replacements then had been working two weeks or less, 4 had been working 3 weeks or less, 15 had been working 5 weeks or less, 7 has been working 6 weeks or less and one had been working 7 weeks or less (UX 4-5). Thus, even if the post-strike assignment were considered the initial one, the new hires still should have been assigned to LG 8.

Finally, insofar as the Company argues that "practical realities" and "realistic views" (CB 24, 25) suggest that there were no "openings" but only "initial assignments" and no settling of replacements into LG 8 status, the Arbitrator remains unpersuaded.[19]

Here, the SSA specifically states in item 1 that the strikers "shall be returned . . . to openings in the classifications" they held before strike in accord with their seniority and the recall provisions of the CBA. The Company says there were no "openings" because the replacements performed the "same function" and "duties" before and after the reclassification (CB 23, 26-7). The Company observes that nothing in the SSA or CBA "says that the upgrading of an individual, without a change in function, constitutes an 'opening,' for

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[19] *American Olean, supra*, also cited on this point (CB 25), is inapposite and does not suggest a different result here. There the only question posed was whether an employer could "recall employees from a chronological list based on the date of an unqualified offer to return to work, when this procedure results in a preference for early offerors over some late offerors with greater plant seniority." 826 F.2d at 1497. Further, there, unlike here, there was no strike settlement agreement providing for recalls to "openings" by seniority and the recall provisions of the CBA. *Id.* at 1500, 1501.

The Company's effort to upgrade all LG 8 new hires before they were qualified by experience on-the-job for such upgrades also suggests or raises an issue as to whether the "replacements" really did "occupy" the jobs of the strikers. See *IAM No. 8 v. J.L. Clark Co.*, 471 F.2d 694 at 698 (7th Cir. 1972). But such issues are not subject to resolution here.

which other employees might compete or to which strikers might return." It continues (CB 26):

> "The only pertinent language in the Collective Bargaining Agreement is Article 11, Section B. 6. (a), which states,
>
> > 'Except as hereinafter provided, any job in a department which becomes "open" (whether by reason of addition to force, death, retirement, discharge or any other reason) shall be listed on the departmental bulletin board for a period of thirty-two hours.'
>
> "The upgrading of an employee, without a change in function, does not fit any of the enumerated definitions of 'open,' * * * ."

Assuming, *arguendo*, that this conclusion of the Company is correct, [20]it rides on the assumption that the replacements were upgraded "without a change in function" — i.e., that they were doing the same work before and after the reclassification. But there is no conclusive evidence that this was true. As already noted, the replacements were placed in LG 8 when hired because they lacked experience and training to qualify for the next higher grade levels, LG 6 or 5. There is no substantial evidence that all the replacements were in fact performing the higher level of work both before and after the

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[20] As to Article 11, the Union observes (UB 18):

> "There, the contract requires that all open positions be posted, and that certain employees be allowed to bid for those positions. An open position is defined as a position that becomes vacant due to 'addition to force, death retirement, discharge, or any other reason.' The only limitation placed upon the posting of a position is that no posting is necessary when an opening is created due to the transfer of an employee who has bid into an open position. In those cases, the opening can be filled by the Company, subject to the Union's right to file a grievance, after consideration of the experience and qualifications of the employees."

reclassification — or at least not performing it without the aid of supervisors. What work was performed by the replacements, both before and after the strike ended (at least in those departments where strikers were not recalled for some time) was peculiarly within the Company's knowledge.[21] Only two Company witnesses gave testimony in this area — Messrs. Nelson and Hainault.[22] While Mr. Nelson stated generally that the replacements did "the work" of the strikers, he had no personal, direct knowledge of what they did before or after the strike ended (R. 141). Mr. Hainault, who was Production Superintendent for most departments for several years, limited his testimony to Department 400 and indicated that he was familiar with what work the employees in that department did both during and after the strike and that it included the higher classification of work — operating a forklift and certain record keeping (R. 177-80). However, it developed, on cross-examination, that Mr. Hainault did not become Production Superintendent of and had "no responsibility" over Department 400 until March 1988, nine months after the strike (R. 180-1, 183).

It is also significant that while Mr. Hainault was Superintendent of Production in Departments 402, 406, 407, 409, 411, 420 and 425 and presumably had personal, first hand knowledge of who was doing various work there both before, during and after the strike, the Company asked him not a single question as to what the replacements did in all the other departments either before or after they were upgraded (R. 177-80, 182-4). Apparently recognizing that the language of Article 11 requires postings for upgradings from entry level

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[21] E.g., Mr. Globis, with a 1952 seniority date, was the first striker recalled to Department 400 when a replacement quit in December 1987 (R. 166).

[22] While the Company had "lots of [other] people" who could have testified in this area, it called none. The Company's failure to call such witnesses gives rise to the inference that their testimony would have been adverse. See Elkouri, *supra*, at pp. 310-11.

positions,[23] the Company also contends that a past practice exists that exempts posting of openings of employees upgraded "from entry level to the next highest position" (CB 26). In this respect it relies heavily on a December 11, 1984 memo as to "job postings" from Personnel Manager Legler to then Shop Chairman Pudlo[24] (with copies to Company Representatives Curcio, Inman and Nelson) as follows (CX 2):

> Recent happenings spotlighted the employee relations problem we can face within the Metals Division when utilizing the job posting procedure as employees become eligible for upward movement from entry level jobs in those departments to which the 1972 6(N) Agreement between Fansteel and Lodge 1777 has been applied. The difficulty arises when such eligible employees have less plant seniority, but greater departmental seniority, than others in the same classification. This very situation was at the center of the predicament we encountered last week in Department 411, which served to introduce the possibility (albeit avoided in this particular instance) of Company-Union disagreement on the question of application of the upgrade language of the CBA. Having such negatives involved in something as inherently positive as a promotion in grade and a rate increase certainly seems inconsistent with the spirit and intent of the 1972 Agreement. I

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[23] If the Company contemplated that upgradings from entry level jobs were not "openings" within the meaning of item 1 of the SSA, it had the obligation to make this clear. As the party who drafted the document, ambiguities, if any, should be construed against it. See Elkouri, *supra*, at p. 362.

[24] Mr. Pudlo was not employed by the Company at the time of the arbitration hearing (R. 192). Several Union witnesses, including Mr. Globis and Donald Springer, the Shop Chairman who replaced Pudlo, said they never saw CX 2 prior to the arbitration hearing (R. 185, 191, 193).

believe an understanding that the established job posting procedure will not be utilized when personnel in entry level grade 8 jobs in Departments 400, 406, 407, 409, 411, 420, 425, 483, are eligible for upgrade to the next higher labor grade in their department is adviseable. The upward movement would be handled strictly administratively (i.e., no job postings) in accordance with the accepted criteria that "it is expected that employees assigned to a labor 8 job shall assimilate the knowledge and training necessary for upgrading such that after approximately nine months experience in the department they will be upgraded." In instances in which this is not the case, you would be advised in accordance with the language of the Labor Agreement.

If you believe such an approach requires further conversation or consideration, please let me know. If not, we shall proceed accordingly. Please keep in mind that we have reached similar understandings elsewhere in the North Chicago Plant.

NOTE: To Curcio, Inman, and *Nelson* only:
This memorandum discussed on 12/11/84
at a meeting attended by Pudlo,
Brown, Maxwell, Inman, and Legler.
Pudlo and associates accepted and
endorsed proposed approach with a
minimum of conversation.

Mr. Legler also testified that CX 2 was sent to the Union and that since December 1984 he has upgraded, administratively and without posting, employees from LG 8 to LG 6 or 5; and said this happened even while employees were on layoff (R. 161-2). However, he offered no specific instances of such occurrences and could not give an example of when an

administrative upgrading occurred while an employee in the higher classification was on layoff (R. 172-3).

First, it is important to note that CX 2 *does* establish on its face that, as of December 1984, the CBA was being interpreted by the Company as requiring it to follow the posting procedures even as to upgrades from the entry level to the next highest level. This would seem to be in accord with the plain, unambiguous language of Article 11 B.

Further, in my opinion, neither CX 2 nor Company testimony has established a contrary applicable past practice as to administrative upgradings. Other than the single incident referred to in the memo (CX 2), the Company offered no such other *specific* incident where its alleged practice was followed or that, if it was, that the Union was made aware of and acquiesced in it at the time.

Most importantly, it must be remembered that as to past practices:

> "One must consider, too, the *underlying circumstances* which give a past practice its true dimensions. A practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day-to-day administration of the agreement. No meaningful description of a practice can be made without mention of these circumstances. For instance, a work assignment practice which develops on the afternoon and midnight shifts and which is responsive to the peculiar needs of night work cannot be automatically extended to the day shift. The point is that every practice must be carefully related to its origin and purpose."[25]

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[25] R. Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements* (14th Annual Proceedings of the National Academy of Arbitrators (BNA, 1961)), pp. 30, 32-3.

> The practice which the Company asserts exists under CX 2 is far different from the circumstances here and is not really precedent for what the Company now claims. Thus, the "difficulty" that gave rise to the practice alleged in CX 2 was that the employee eligible for promotion had "less plant seniority but greater departmental seniority than others in the same classifications." But here, the "eligible employees" (the replacements) have less plant *and* less departmental seniority than the strikers. Hence, there is no demonstrated need for applying CX 2 here, assuming that a binding practice has otherwise been shown to exist under CX 2.

Moreover, it appears that the 1987 strike was the first time in at least 22 years (if ever) that the Company hired replacements during a strike (R. 174-5). Thus, there is no evidence that the alleged practice has ever before been applied to a situation where, as here, the Company seeks to upgrade entry level employees without following posting and bidding procedures to "openings in . . . classifications" under a SSA with the purpose or effect of preventing the return of former striking employees. The first time the Company tried to expand the alleged practice — now — the Union objected and went to arbitration.

The Union has pointed to other sound reasons why CX 2 is inadequate to give rise to the practice claimed by the Company. Thus, it observes (UB 19-20):

> "The detailed structure of the job classification system, and the language in the contract regarding upgrades is clear and unambiguous. According to the terms of Article 22 of the contract, no changes in the terms and provisions of the contract are permitted 'unless they are reduced to writing and signed by the Company, the Shop Committee, and the Business Agent of the Union'. [CX] 2 is signed by the Company, but not by anyone from the Union. It

therefore is not sufficient to alter or amend any of the terms of the contract."[10]

[10] It should be noted that [UX] 7, which both parties agreed altered the terms of the contract was signed by the Company, the Shop Committee, and the Union's Business Agent pursuant to the terms of the contract.

"Furthermore, * * * [CX] 2 purports to eliminate all competitive bidding on upgrades in all entry level classifications. It makes a nullity of the bargained for classification and bidding system. [CX] 2 purports to undo with all of the prior years of bargaining over the classification system and bidding procedure. It is difficult to imagine the Union agreeing to such a sweeping proposal, especially 'with a minimum of conversation' as described in the exhibit."

Finally, the Union notes that even if CX 2 were deemed to have validated a change in the CBA, by CX 2's terms employees could be upgraded only if they met the experience requirements of the job classifications, which is 9 months under CX 2 (UB 20-1).

In sum, it is my opinion that the Company was not justified under the CBA or any established past practice in "administratively upgrading" the replacements shortly after the strike ended and that under the CBA and the SSA, item 1, the Company was obligated to have recalled strikers to fill the job openings in the higher labor grades LG 6 and LG5 in accordance with their seniority and the recall provisions of the CBA.[26]

[26] Cases cited by the Company, (CB 27-8; *supra*, p. 25, fn. *) are not applicable here. First, they are primarily references to external, federal law, which is not being interpreted or applied here since the Arbitrator's jurisdiction is limited to interpreting the contracts — SSA and CBA — before him. Even if those cases could supply guidance to this contract interpretation matter, they do not aid the Company, as noted below.

(footnote continues)

(footnote continued)

MCC Pacific Valves, 244 NLRB 931 (1971) does not hold that "a vacancy will not be found if permitting a striker to claim a vacancy would result in displacement" (CB 27). In that case, although 108 strike replacements were hired during the strike, almost all of the strikers were returned to work either during the 1 month strike or upon its conclusion. Shortly after the strike ended, the company began posting jobs, some of which were not offered at all to unreinstated strikers. Other such initial jobs were not offered to unreinstated strikers but the bottom rung jobs resulting from the bidding-bumping process by employees already on the payroll were offered to unreinstated strikers. However, the NLRB held that such preference to those already on the payroll was a violation of the Act.

As to *IAM v. United Aircraft*, 534 F.2d 422, 442 (2nd Cir. 1975), the Company's long quote at CB 28 must be put in context. At issue there was the company's claim that its transfer and promotion of employees was necessary because of imbalances caused by the strike — i.e., work might dry up in one particular area of production while openings would develop in another where registered strikers were awaiting recall. The company argued that if its SSA and CBA prohibited promotions and transfers to fill such openings it would have to layoff active employees and recall strikers or wind up with more employees than it needed. The union argued the SSA and CBA required recalls. Throughout the opinion (see e.g., p. 444) the court stressed that the company's position was correct only if it was based on production imbalances. Thus, right after the long quote the Company relies on (CB 28), the court continued at pp. 442-3:

> "On the other hand, where a promotion or transfer was made not to correct a production imbalance and the effect of the promotion or transfer was to deny recall to a striker or cause a striker to be recalled to a lower labor grade than he otherwise would have, the action constituted a breach of the Agreements because it denied an available job to a registered striker."

In the instant case there is no claim or evidence that the upgradings were the result of production imbalances.

Giddings & Lewis, Inc. v. NLRB 675 F.2d 926 (7th Cir. 1982) held only that the company did not violate the NLRA by giving preference on recall to laid off permanent replacements instead of more senior unreinstated economic strikers. It did not involve a SSA or CBA providing for recall of strikers to openings in classifications by seniority.

(footnote continues)

Assuming that strikers are not considered to be on layoff status,[27] under the SSA the strikers here were given the right to be recalled to "openings" in classifications they held before the strike. Under Article 11 of the CBA "open" jobs includes promotions or upgradings from the entry level to the next level in a given classification. The Company could not avoid giving effect to this Contract language by administratively upgrading replacements instead of posting the jobs, which became "open" by upgrading, for bidding.

3. Did the Company, after the strike was over and the CBA was in effect, use foremen to perform bargaining unit work in violation of the CBA?

There is direct, undisputed evidence that on at least 30 occasions between July and December, foremen in Department 400 prepared Receivers, work regularly done by bargaining unit employees. The Company does not deny these facts or that the Contract (JX 1, p.81; *supra*, p. 14) bars foremen from doing such unit work. But, it claims that this amounted only to about 2 minutes of work[28] per week and such "trivial quantity of lost work obviously did not prevent a striker from being returned . . . " (CB 31).

However, I believe the Company misses the point and that the "*De Minimus*" rule should not be applied here. The record shows that the replacements were upgraded before they had sufficient, customary time and experience on the job to warrant such upgrade. The admitted fact that foremen

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(footnote continued)

Gallatin Homes, 81 LA 1279, was concerned with an issue similar to that posed in *Giddings* but interpreted a different strike settlement agreement which used the word "vacancy" rather than "opening."

[27] See cases cited by the Company (CB 29-30), *supra*, p.25, fn. **.

[28] While it may take as few as two minutes to input the data for some Receivers into a computer terminal, the actual time for preparing a Receiver would be more than a few minutes if one considers the necessary work up to and including an evaluation of the goods being received.

were doing this kind of bargaining unit work in Department 400 tends to corroborate the conclusion that the replacements were upgraded before they were qualified to perform the higher classification of work. Mr. Globis was aware of only one time that a foreman did a Receiver in his area of the plant. Now, after the strike ended, foremen were doing them at least once a week on average.[29] The *De Minimus* doctrine cannot be applied where, as here, foremen knowingly and repeatedly perform unit work because of the Company's failure properly to upgrade employees who could do the work, all to the obvious end of avoiding a recall of strikers who could have performed the higher classification of work the supervisors had to do.

It is true, as the Company says (CB31), that apart from Department 400 there is no direct evidence of foremen performing bargaining unit work. The Union attributes such lack to the "unfortunate reality" that the replacements "are refusing to cooperate with the union" (UB 23, fn. 11) and that after the strike many departments were still filled primarily with replacements. The Union also suggests that "indirect" evidence of foremen performing unit work in other departments may be found in the fact that the replacements had neither the skills nor qualifications to perform all of the work during

[29] Of course, Department 400 continued to be manned only by replacements until December 1987 when Globis was recalled. It is understandable that direct evidence of foremen performing bargaining unit work would be hard to come by. The Company, which presumably had access to all of the post-strike Receivers, offered none into evidence; and Mr. Globis's count of 30 Receivers by foremen was based only on what he could find available and was not based on an analysis of all Receivers between July and December.

the strike (UB 23). While there may be merit to this argument,[30] there is no need to further resolve this issue in light of my finding that all of the openings to LG 6 and 5 positions should have been posted for bidding on or about July 28.

4. What remedies are appropriate under the circumstances?

It is true that during negotiations leading to the SSA and the CBA the Company made clearly known its position that it would not replace the replacements with strikers automatically after the strike. But the Union did not accede to this position and items 2 and 3 of the SSA were expressly noted as not being agreed to by the Union or waived by the Company. But in item 1 of the SSA the parties did agree that strikers would be entitled to "openings" in classifications they held when the strike began. Under the CBA, I have found, there were such openings after the strike when the Company decided to upgrade the LG 8 replacements on or about July 28. By failing to post those openings for bidding and recalling strikers by seniority under the recall provisions of the CBA, the Company breached both the CBA and the SSA. The only proper, feasible remedy is to require the Company to post all of those openings now and recall the successful bidders in accordance with their rights under the SSA and the CBA. Employees who have lost earnings since the time when they should have been recalled must also be made whole for such losses.

In ordering such relief the Arbitrator is not passing on the rights, if any, of the replacements. Nor is he awarding a

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[30] Of course, the Union had no one in the plant during the strike to observe what the replacements were doing. But, if the replacements could not do non-routine Receivers for months after the strike, there is no reason to believe they could do them before. It also is significant that the sole Company witness who testified and had knowledge of what work replacements and foremen were doing in most of the production departments during and after the strike offered no testimony on the subject.

remedy which the Union "was unable to achieve in negotiations" (CB32). What the Union sought, and the Company declined to give in negotiations, was the immediate recall of the strikers and termination of the strikers as the mere result of the ending of the strike. The parties expressly contemplated that events occurring *after* the strike could and would give rise to recall of the strikers. What the Company overlooked or miscalculated was that after the strike the replacements could not continue at the entry level LG 8 classification and perform or attempt to perform work of higher classifications. When the Union confronted the Company with this fact the Company attempted to cure the Contract violation by upgrading the replacements. But in the process it opened the door to "openings" which the strikers were entitled to bid on and be recalled for under the SSA and the CBA. The Company was on the horns of a dilemma it may not have foreseen. This in itself was understandable since it had not hired replacements in a strike for at least 22 years and perhaps never before. But, in any event, the Company must face the natural consequence of events transpiring after the strike and which are mandated by the express provisions of the CBA and SSA.[31]

Award

The grievance is sustained.

1. The Company shall promptly post for bidding all of the LG 6 and LG 5 openings that resulted from the upgrading of LG 8 replacements by the Company administratively on or about July 28, 1987 and permit all employees entitled to bid on such openings to do so and return to work employees entitled to such openings in

[31] The Company apparently overlooked or ignored a compromise position of limiting the replacements to LG 8 work and upgrading and posting for bid only the number of jobs where it was actually necessary to perform work in classifications higher than LG 8 (See UB 17, n. 7).

accordance with their seniority and recall rights under the Strike Settlement and Collective Bargaining Agreements.

2. Employees who were entitled to such openings but not returned to work by the Company shall be made whole for any loss of earnings sustained.

3. Foremen shall cease and desist from performing work normally performed by bargaining unit employees except as specifically permitted by the letter Agreement dated June 1, 1975.

Aaron S. Wolff, *Arbitrator*

Entered at Chicago, Illinois
this 29th day of September, 1988.

APPENDIX D

FANSTEEL, INC., AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE NO. 1777	FMCS No. 87-25922

Report of proceedings had in the above-captioned matter, taken before Cindy Benner, C.S.R., a notary public within and for the County of Lake and State of Illinois, at One Tantalum Place, North Chicago, Illinois, on Friday, April 15, 1988, at the hour of 9:00 A.M.

Reported for
LAKE SHORE REPORTING SERVICE
701 Sumac Parkway Waukegan, IL
By: Cindy Benner, C.S.R.

APPEARANCES:

MR. AARON S. WOLFF,
33 N. Dearborn Street,
Suite 1410,
Chicago, Illinois,

appeared as the hearing officer;

MR. WILLIAM A. WIDMER, III,
of the law firm of
Carmell, Charone, Widmer & Mathews, Ltd.,
39 South LaSalle Street,
Chicago, Illinois,

appeared on behalf of the union;

MR. ERIC HEMMENDINGER, of the law firm of
Shawe & Rosenthal,
20 S. Charles Street,
Baltimore, Maryland,
301-752-1040

appeared on behalf of Fansteel, Inc.

THE ARBITRATOR: I will mark it as Company Exhibit No. 1 for the record if there is no objection.

MR. WIDMER: No.

THE ARBITRATOR: That concludes your opening?

MR HEMMENDINGER: Yes, it does.

THE ARBITRATOR: Are you ready to proceed?

MR. WIDMER: Yes.

THE ARBITRATOR: Testimony? What is your pleasure about witnesses being sworn?

MR. WIDMER: I would prefer that they be sworn.

THE ARBITRATOR: I will ask the court reporter to swear all of the witnesses at one time.

(Witnesses sworn.)

MR. WIDMER: Mr. Globis, take the stand please.

MR. WIDMER: Off the record for a moment. (Discussion off the record.)

MR. HEMMENDINGER: Before you start this witness, there is one more thing. There was a discussion off the record about the fact that the company is contending that the relief sought by the union is non-arbitrable and that the grievance is to the extent it seeks reinstatement of strikers or back pay in lieu of reinstatement also non-arbitrable and I believe the union's suggestion was if that is the position taken by the company, then we should refuse to submit this case to arbitration. He cited a couple cases which I have not looked at.

I want to make it clear on the record that we are not waiving any objection in that regard but think it is an issue to be decided in the first instance by the arbitrator subject to review by a court if the arbitrator exceeds his jurisdiction

under the collective bargaining agreement and the submission and certainly if the union feels that we are waiving anything by going forward here, then I would want to take a close look at the cases discussed in order to avoid any such waiver.

MR. WIDMER: Mr. Hemmendinger, I am not going to advise you how to conduct yourself. I have stated my position off the record.

THE ARBITRATOR: Why don't you state it on the record?

MR. WIDMER: I was about to say so that the record is clear, I will state it on the record. I believe that the—My statement was briefly that the United States Supreme Court Decision in the A T & T case is clear as to where its use with respect to arbitrability are to go if you want a court determination in the first instance and I made reference to a Jones Dairy Farm. It's a decision of the United States Court of Appeals for the Seventh Circuit, decided prior to A T & T. It's roughly a 1984 or 1985 decision.

That stands for the proposition, as I indicated off the record, that the parties may submit anything to an arbitrator they agree to submit and having submitted cannot contend that that issue is not arbitrable. I am not going to characterize waiver or non-waiver. I am going to reserve the right to take every position I think is appropriate under the case law.

MR. HEMMENDINGER: Well, we would make the same reservation and in terms of Jones Dairy, we will make it clear that we are not agreeing to submit anything to the arbitrator which would require reinstatement of strikers or back pay in lieu of reinstatement because we think it's beyond the contract. We have confidence in the arbitrator to make that decision.

MR. WIDMER: I could make this easy for everybody. As I said in my opening statement on the record and I will repeat, we are not seeking to litigate here issues involving the

National Labor Relations Act. We are not seeking relief directly or indirectly pursuant to that act.

We are seeking—We are contending that the collective bargaining agreement has been violated and that we have a remedy under that agreement and the remedy that we are seeking is one well within the authority of the arbitrator under the agreement.

MR. HEMMENDINGER: Well, I understand your position and I think my position is satisfactorily set forth on the record at this point. I will look at the cases during a break. At this point you can go ahead.

MR. WIDMER: I have already had Mr. Globis assume the witness's chair and he has been sworn.

EXAMINATION
BY MR. WIDMER:

Q. Would you state your name for the arbitrator, please?

A. Richard Globis

Q. What was your date of hire by Fansteel?